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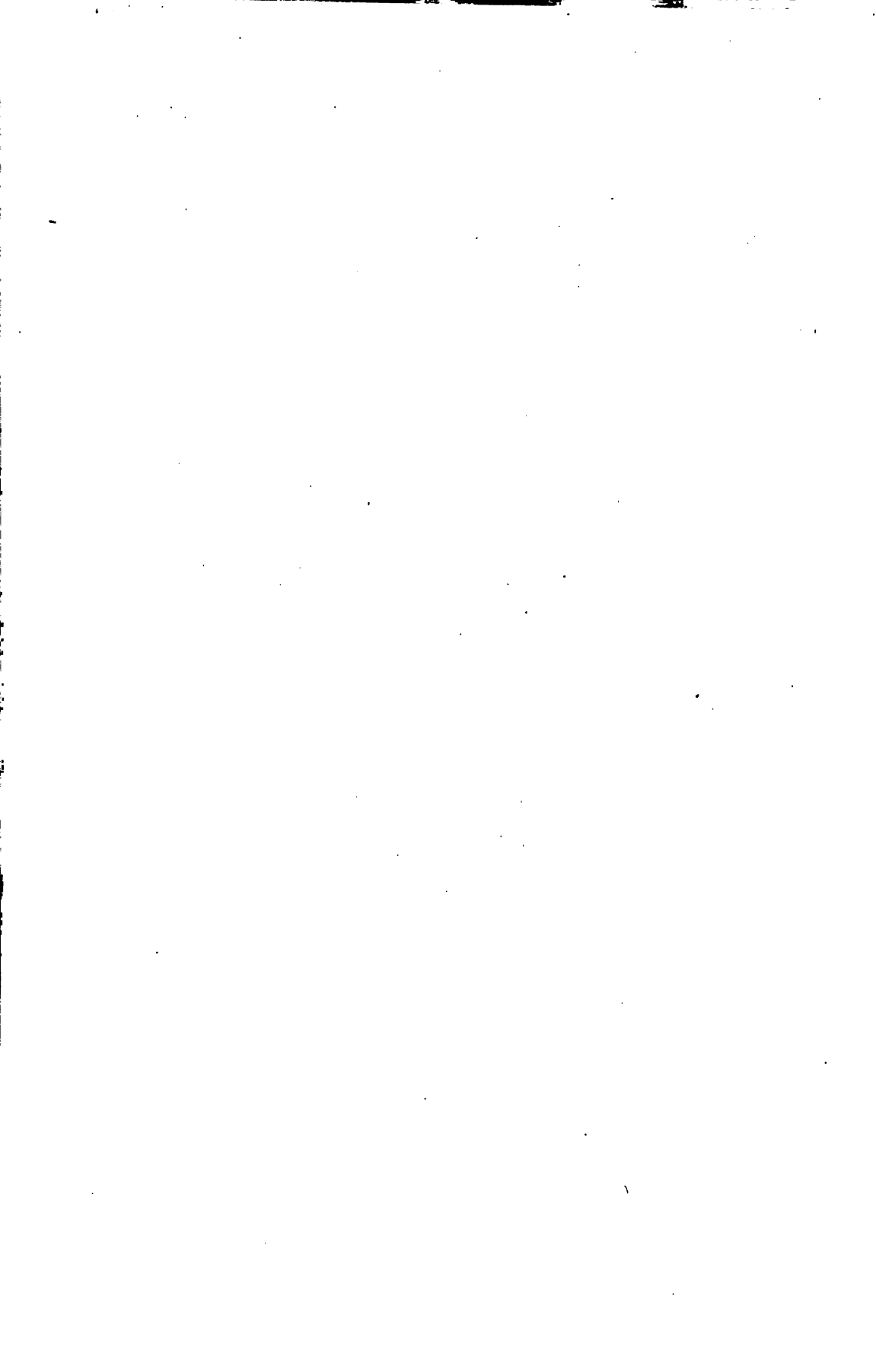
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BY
J. H. BALFOUR BROWNE,
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DIGEST OF CASES ⁽¹⁾

Relating to Railway Traffic, and the Rating of Railways, decided in the Superior Courts of Law.

COMPENSATION FOR PERSONAL INJURIES.]—It is not evidence of negligence on the part of servants of a railway company that they close railway carriage doors without warning passengers seated inside the carriage, and not in the act of getting in or out, and a passenger so seated whose finger is crushed in the door cannot recover damages for personal injuries. *Drury v. North Eastern Ry. Co.*, [1901] 2 K. B. 322; 70 L. J. K. B. 890; 84 L. T. 658.

GOODS TRAFFIC.]—1 The Highland Railway Company accepted at Inverness a piano in a packing case to be delivered at Orkney under a consignment note to this effect, "Ordinary consignment note for traffic carried at company's risk. The Highland Railway Company will please receive the under-mentioned goods, and forward them subject to the conditions on the back hereof. Senders: L. & Co.; Consignee, J. G., Orkney; Transit: goods train and steamer, *via* Aberdeen. Sender pays carriage to Aberdeen; consignee pays steamer freight."

One of the conditions at the back was, that in respect of goods booked through by the company for conveyance partly by railway and partly by sea, "the company shall be exempted from liability" for any loss or damage during the carriage by sea from accidents from machinery, boilers and steam. The piano arrived damaged at Orkney, delivery was refused, and the sender sued the railway company for damages. The latter contended that as there was no through fare, and as they were only entitled to hire for the carriage to Aberdeen, they were not liable as carriers beyond that point:—*Held*, that the consignment note imposed a contract on the railway company to carry the goods from Inverness to Orkney, and that they were responsible as carriers for the safe carriage of the goods to Orkney. *Logan v. Highland Ry.*, 2 F. 292.

2. Where there is a through booking of goods which necessitates their being carried over lines owned by different companies, a condition limiting the liability of the contracting company to wilful misconduct of its servants on its own line is valid. When the goods are damaged in transit, the onus of proving that they were not damaged by the wilful misconduct of the servants of the contracting company on its line lies on the contracting company. *Mahony v. Waterford, Limerick, and Western Ry.*, [1900] 2 Ir. R. 273.

3. G., having contracted with a railway company that they were to be exonerated from liability in respect of the transit of his goods, save when the damage arose from their wilful misconduct, delivered at Ballymena station for carriage to Manchester, a case of fowls, which the railway company knew to be perishable goods, requiring to be forwarded without delay. They failed to despatch the goods by either of two trains which would have ensured their arrival in time for the Manchester markets on the following morning, for which they were intended, and when the goods did arrive in Manchester they were late, and being perishable had deteriorated in value.

(1) This Digest is a continuation of the Digests in Vols. I.—X.

At G.'s instance the consignee refused to take delivery, and G. sued the company for the loss occasioned by their wilful misconduct in delaying the goods:—*Held*, that under the circumstances, unreasonable delay, even though entirely unexplained, was not sufficient to amount to wilful misconduct, and that it lay upon the plaintiff to prove that the defendants intentionally delayed the goods. *Graham v. Belfast and Northern Counties Ry.*, [1901] 2 Ir. R. 18.

4. A machine of the value of 100*l.* was damaged while in the custody of a railway company. The consignee refused to take delivery, and sued the carrier for the value of the machine. It was proved that the damaged parts of the machine could be repaired at a cost, according to the defendant's witnesses, of 16*l.*, and, according to the plaintiff's witness, of 30*l.*, in addition to the expense of an expert to adjust them; but the plaintiff's witnesses would not say that in the result the machine would work satisfactorily:—*Held*, that the machine was so much damaged that the consignee was entitled to reject it, and that the carrier was bound to pay the full value of the machine. *Dick v. East Coast Railways*, 4 F. 178.

5. A. delivered to a railway company at Peebles a box for carriage to a consignee in Edinburgh. At Edinburgh the box, while in the custody of the railway company, was opened by a fishery officer, who took possession of a salmon contained in it. Thereafter a criminal prosecution was raised against A. for having in her possession a salmon known by her to have been taken from the Tweed in close time. A. was tried and acquitted. A. then brought an action against the railway company, claiming general damages and the expenses she had incurred in defending the prosecution, averring that the damage had been caused by the fault of the defendants in allowing the box to be opened and the salmon removed without a legal warrant, and by this breach of the contract of carriage:—*Held*, that the action could not be maintained. *Boswell v. North British Ry. Co.*, 4 F. 500.

LEVEL CROSSING.]—A public road crossed a railway by means of a level crossing, A horse which was being taken over the level crossing was injured, through one of its feet being caught between one of the rails and a chair on which the rail rested, owing to the wooden wedge which kept the rail in position not being completely driven in. In an action of damages by the owner of the horse against the railway company it was proved that the line, including the level crossing, was regularly inspected by platelayers twice a day for the purpose, *inter alia*, of seeing that the wedges, which were liable to be displaced by trains passing along the line, were properly driven in; that the crossing had been so inspected within an hour before the accident, and that two trains had passed along the line after the inspection and before the accident:—*Held*, that the defendants had taken all usual and reasonable precautions to keep the level crossing in a safe and proper condition; that the accident was not due to the fault of the defendants; and that they were not liable in damages to the pursuer. *Bell v. Caledonian Ry. Co.*, 4 F. 481.

NEGLIGENCE.]—1. A railway company is not liable for damage resulting from a fire caused by sparks from an engine running on their line, in the absence of negligence in the construction or use of such engine. *Canadian Pacific Ry. Co. v. Roy*, [1902] A. C. 220; 71 L. J. P. C. 51; 86 L. T. 127.

2. A railway company, who, for their own convenience in shunting operations leave a brake-van or other vehicle in a position and condition not at the time dangerous to other persons, but which to their knowledge may become so if interfered with by trespassers, and who also know that there is a risk of such interference and consequent danger to others, will, if they might have guarded against the danger by the exercise of reasonable care, be liable for any injury, the occurrence of which is materially and effectively caused by their want of reasonable care and skill in keeping

and placing the vehicle in such a condition and position. *McDowell v. Great Western Ry.*, [1902] 1 K. B. 618; 71 L. J. K. B. 330; 86 L. T. 558. See also *Passenger Traffic, Level Crossing, and Compensation for Personal Injuries*.

PASSENGERS' LUGGAGE.—A passenger travelling with a free pass on conditions exempting a railway company from liability for the loss of his luggage, cannot claim the benefit of section 14 of the Regulation of Railways Act, 1868, which requires notice of such conditions to be posted in the company's office. *The Stella*, [1900] P. 161; 69 L. J. P. 70; 82 L. T. 390.

PASSENGER TRAFFIC.—Railway companies are bound to use proper care and skill in conveying their passengers, but they are not liable as common carriers of passengers independently of negligence.

When a passenger was killed in a railway carriage by an explosive illegally introduced into it:—*Held*, that the railway company was not liable in damages unless guilty of negligence in permitting the fireworks to be brought into the carriage. As it was not the duty of the company to search every parcel carried by a passenger, the onus was on the plaintiff to show that the parcels containing the fireworks suggested danger. *East Indian Ry. Co. v. Kalidas Mukerjee*, [1901] A. C. 396; 70 L. J. P. C. 63; 84 L. T. 210. See also *Compensation for Personal Injuries*.

PUNCTUALITY.—A workman travelled by an early workman's train, which arrived late, and he consequently lost a day's wages:—*Held*, that the railway company were not liable, notwithstanding their admitted negligence, because the printed notice on the back of the ticket, absolving them from responsibility for delay or detention, was a condition incorporated into the contract. *Duckworth v. Lancashire and Yorkshire Ry. Co.*, 84 L. T. 774; 49 W. R. 541.

RATING OF RAILWAYS.—A signal-box is part of the non-productive property of a railway, in respect of which a deduction is allowed from the gross receipts of the railway for the purpose of assessing the railway to poor rate in a parish, but is rateable locally according to the parochial principle of rating. *Midland Ry. v. Pontefract Union*, [1901] 2 K. B. 189; 70 L. J. K. B. 691; 84 L. T. 536.

STATION.—1. When a cabman in a railway station has concluded the business which brought him there, and refuses to leave, and persists in refusing to leave, he becomes a trespasser, and the railway servants are at common law entitled to remove him by force if necessary. *Wood v. North British Ry. Co.*, 2 F. 1.

2. Section 23 of the Regulation of Railways Act, 1868, enacts: "If any person shall be or pass upon any railway, except for the purpose of crossing the same at any authorised crossing, after having received warning not to go or pass thereon, every person so offending shall forfeit and pay any sum not exceeding forty shillings for every such offence." Section 2 of the Act defines "railway" as meaning "the whole or any portion of a railway":—*Held*, that a railway station platform was not part of a railway within the meaning of section 23, and proceedings under that section in respect of trespass on the platform of a station are incompetent. *Thomson v. Great North of Scotland Railway*, 2 F. (Just. Cases) 22.

STATUTORY OBLIGATION TO CONSUME SMOKE.—By section 114 of the Railways Clauses Consolidation Act, 1845, engines are to be constructed so as to consume their own smoke; and any company using an engine not so constructed shall forfeit 5*l.* for every day's user. By section 19 of the Regulation of Railways Act, 1868, the offence is extended to engines which are constructed to consume their own smoke, but fail to do so through the default of the company or their servants.

Certain locomotives emitted black smoke for three minutes on various occasions.

Evidence was given that the coal used was smoky coal, and that it was unnecessary for a locomotive to emit smoke for longer than one minute; but no evidence was given that the locomotives were not constructed on the principle of consuming their own smoke, or that the failure to consume their own smoke arose through any default of the company:—*Held*, that there was sufficient evidence to convict under the above sections. *South-Eastern and Chatham Ry. Co. v. London County Council*, 84 L. T. 632.

TUNNEL—POSSESSION OF SURFACE BY STRANGER.]—A stranger may, by exclusive possession for the statutory period, acquire a title to the surface of land situate vertically over a tunnel forming part of a railway company's undertaking, even although not superfluous land, and, therefore, land which the railway company could not sell or dispose of, together with so much of what is beneath the surface as is necessary to the enjoyment of such surface, subject to the right of the railway company to the tunnel, and to so much of the underlying and superincumbent strata as is necessary for its due and proper enjoyment as a tunnel. He may also acquire a title to the space above the surface by the exercise of rights of ownership in such space, such as leasing a right to the railway company to carry their telegraph wires over the land, where it is not shown that the occupation of the surface is necessary, although it may be convenient, for the railway company for the purpose of carrying such wires. *Midland Ry. Co. v. Wright*, [1901] 1 Ch. 738; 70 L. J. Ch. 411; 84 L. T. 225.

UNDUE PREFERENCE.]—An undue preference in the carriage of goods given by a railway company to a customer, though contrary to law, is not *ultra vires*, and no action in respect thereof lies against the company or the customer at the instance of a shareholder. *Anderson v. Midland Ry. Co.*, [1902] 1 Ch. 369; 71 L. J. Ch. 89; 85 L. T. 408; 50 W. R. 40.

Railway and Canal Traffic Cases.

FORTH BRIDGE AND NORTH BRITISH RAILWAY COMPANIES

r.

GREAT NORTH OF SCOTLAND AND CALEDONIAN RAILWAY
COMPANIES ⁽¹⁾.

Apportionment of Through Rates—Bonus Mileage—Particulars of Rates Necessary—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25—Written Notice under Sub-section 1—Jurisdiction—Joinder of Parties.

Upon an application under sections 25 and 26 of the Railway and Canal Traffic Act, 1888, to the Railway and Canal Commissioners to fix the apportionment of "all agreed-on rates chargeable on traffic passing, *via* the Forth Bridge, between stations on the Great North of Scotland railway and on the Caledonian railway between Aberdeen and Kinnaber Junction, on the one hand, and stations on the south of the Forth Bridge on the other, as between the respondents and the applicants, on the footing that the applicants shall receive in every case from the said rates as the share belonging to the Forth Bridge company, such sum as they would be entitled to receive if the distance traversed by such traffic over the Forth Bridge railway were 19 miles more than it actually is."

October 19,
1897.
January 26,
1898.

Held, that such a description of rates is too general and indefinite, and that full particulars are required of rates proposed for apportionment, which should include their amount, the termini for each rate, and the route between those termini, in order that no mistake may occur in the identification of the rates.

Held, further, that although by sections 104 and 106 of the Caledonian and Scottish North Eastern Railways Amalgamation Act, 1886, the North British company were empowered to fix the rates and fares for Scottish east coast traffic over their own and the Caledonian company's lines, and it was further provided that, after the deduction of certain charges, including the proportion of any through rate payable to other companies, the residue of such rates and fares should be divided between the Caledonian company and the North British company according to the actual distance the traffic travelled over their respective railways, or in such proportions as might be agreed on between them, or in case of difference as should be settled by the arbitrator; yet the jurisdiction of the Court was not ousted by that of the

(¹) Before Lord TRAYNER and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Parliament House, Edinburgh.

1897, 1898.

FORTH
BRIDGE AND
NORTH
BRITISH
RY. COS.
v.
GREAT NORTH
OF SCOTLAND
AND
CALEDONIAN
RY. COS.

arbitrator, because the application was not to apportion a through rate, or residue of a through rate, between the North British and Caledonian companies, but to apportion a through rate between all forwarding companies engaged in the east coast traffic.

Sub-section 1 of section 25 of the Railway and Canal Traffic Act, 1888, which requires "written notice" of the proposed through rate to be given to each forwarding company, stating both the amount and the route proposed, and the proportion of the rate claimed by the company making the proposal, had been sufficiently complied with in this case, where each forwarding company, including the respondents, had after the opening of the Forth Bridge received the aforementioned particulars at meetings of the railway clearing-house, of which a written record was kept, although written notice had admittedly not been given to each forwarding company (*per* LORD TRAYNER).

Since the effect of the application would not be confined to the two respondent companies, but would leave a less sum to be divided among all the other companies interested, rates with which other companies were concerned could not be considered without such companies being joined as respondents (*per* SIR FREDERICK PEEL).

THIS was an application under sections 25 and 26 of the Railway and Canal Traffic Act, 1888.

The applicants were the owning and working companies respectively of the Forth Bridge line of railway. The said line was constructed under the powers of section 4 of the Forth Bridge Railway Act, 1882, and was thereby declared to be in substitution for a railway authorised by the Forth Bridge Railway Act, 1873, and therein called Railway No. 1. By section 14 of the Forth Bridge Railway Act, 1878, it was provided as follows:—

"The extra mileage (in this Act called 'bonus mileage') to be charged in lieu of the additional tolls demandable under the Forth Bridge Railway Act, 1873, in respect of the use of Railway No. 1 of the company, including the Forth Bridge, upon traffic between North British stations south of the Tay, on the one hand, and places 25 miles south and east of Ratho Junction and 45 miles west of Ratho Junction, on the other hand, shall be 10 miles, and with regard to all other traffic shall be 19 miles."

The applicants stated that since the opening of the Forth Bridge for traffic, the receipts on traffic arising or terminating on the lines of the North British company north of the Forth, and passing over the Forth Bridge to or from the south, had been divided, as if the traffic were conveyed for 19 miles more

over railways belonging to the Forth Bridge company than it actually had been. 1897, 1898.

The applicants now asked that a number of through rates, which they said had been agreed on by the respondents, on the one hand, and the North British company and other railway companies south of the Forth, on the other hand, should be divided, on the footing that the traffic passed on the Forth Bridge railway over 19 miles more than it actually did—all the railway companies interested having acquiesced in that contention except the respondents.

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The applicants asked for an order, "finding that all agreed-on rates chargeable on traffic passing, *via* the Forth Bridge, between stations on the Great North of Scotland railway and on the Caledonian railway between Aberdeen and Kinnaber Junction, on the one hand, and stations south of the Forth, on the other hand, shall be divided as between the respondents and the applicants, on the footing that the applicants shall receive in every case from the said rates, as the share belonging to the Forth Bridge company, such sum as they would be entitled to receive if the distance traversed by such traffic over the Forth Bridge were 19 miles more than it actually is."

The respondents denied that the Commissioners had jurisdiction in this case; the Caledonian company stating in their answer that the through rates mentioned in the application were not made by agreement between them, on the one hand, and the North British company and other companies south of the Forth, on the other hand, but that they were fixed by the North British company under section 106 of the Caledonian and North-Eastern Railways Amalgamation Act, 1866, which conferred running powers on the North British company over the Caledonian company's Scottish North-Eastern railway between Aberdeen and Kinnaber Junction, and authorised the North British company to fix the rates and fares for all Scottish east coast traffic, and further provided that, in case of difference as to the apportionment of such rates and fares, the matter should be settled by the arbitrator.

The respondents, the Great North of Scotland company

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contended, in their answer, that the Forth Bridge route was not the shortest route between the east coast of England and the east coast of Scotland south of the Forth, on the one hand, and the east coast of Scotland north of the Forth and the system of the Great North company, on the other, and that the apportionment should be regulated by the mileage of the shortest route; also that, no addition having been made to the rates since the bridge was opened, no charge had been made in respect of the bonus mileage against the public, and therefore no allowance could be made to the applicants. They further contended that the provisions of sections 25 and 26 of the Railway and Canal Traffic Act had not been complied with, and that the applicants had not adopted any of the proceedings thereby required.

It appeared from the evidence at the hearing that at the time of the opening of the Forth Bridge, the North British railway company gave notice at the railway clearing-house that the through rates in existence would thenceforward be applicable to the new route *via* the Forth Bridge, and that they claimed the bonus of 19 miles. This notice was considered at the ordinary meetings of the companies, with the result that the Caledonian and Highland companies, and afterwards the Great North of Scotland company, dissented, all the other companies assenting to the 19 miles being treated as part of the route.

Dean of Faculty (Asher, Q.C.) and Cooper, for the applicants:

By sub-section 8 of section 25 of the Railway and Canal Traffic Act, 1888, the Commissioners are bound to take into consideration, in apportioning a through rate, any special expenses incurred in respect of the construction or maintenance of any part of the route. The rates were "agreed" because the old rates (all parties consenting) had been transferred from the old route to the new. They had not been raised since the new route was adopted, owing to competition; this did not affect the question of apportionment under sub-section 8. The 19 miles claimed are not founded on the statute; but the legislative sanction then given (in 1878) shows the amount to be reasonable.

Lord Advocate (Balfour, Q.C.) and Nicolson, for the Caledonian railway company : 1897, 1898.

The Railway and Canal Commissioners have no general jurisdiction to apportion a rate; sub-sections 1, 2, and 8 of section 25 of the Railway and Canal Traffic Act, 1888, have first to be complied with. The rate must have been brought into existence on the requirement of a private trader or two contending companies. The matter has never been referred to the Commissioners under sub-section 4. The rates were not agreed, but were fixed by the North British company under the powers of the Act of 1866, and have never been changed since, and the arbitrator is given jurisdiction under that Act, in case of differences as to their apportionment.

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Solicitor-General (Dickson, Q.C.) and Ferguson, for the Great North of Scotland railway company :

The application is incompetent, as it does not ask the Court to deal with definite and fixed rates, but asks for a general declaration that all rates for traffic passing over the Forth Bridge, without any specification of them, shall be subject to the bonus mileage.

Dean of Faculty, in reply : When notice was given at the clearing-house, no company objected to the rate itself; the only matter in dispute is the apportionment, which is precisely what sub-section 7 of section 25 of the Railway and Canal Traffic Act, 1888, says the Commissioners are to deal with.

The Amalgamation Act of 1866 does not empower the North British company to fix a rate over the Forth Bridge railway, which was not their railway in any sense.

Johnston, Q.C., and Macphail appeared for the Highland railway company.

LORD TRAYNER : This is an application by the Forth Bridge and North British railway companies "for the purpose of having the agreed-on rates for traffic passing *via* the Forth Bridge between stations on the Great North of Scotland railway and on the Caledonian railway between Aberdeen and Kinnaber Junction on the one hand, and stations south of the Forth

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Bridge on the other, apportioned, the apportionment thereof not being agreed on between the applicants and respondents." The application is made in terms of the 25th and 26th sections of the Railway and Canal Traffic Act, 1888 ; but it appeared in the course of the discussion that sub-section 8 of section 25 is that upon which the applicants mainly, if not entirely, found. It was objected on behalf of the respondents that the Court had no jurisdiction in existing circumstances to deal with this application. The first objection, which was maintained on behalf of the Caledonian company only, was based upon sections 104 and 106 of the Caledonian and Scottish North-Eastern Railways Amalgamation Act, 1866. These sections (to state their import shortly) provide that the North British company should have running powers over the Scottish North Eastern lines ; that the North British company should have power to fix the rates and fares at which Scottish east coast traffic should be conveyed by them "for the whole distance for which it shall be so conveyed upon their own railways and the Scottish North-Eastern lines" ; that after deduction of certain charges, including the proportion of any through rate payable to other companies, the residue of such rates and fares should be divided between the Caledonian company and the North British company, according to the actual distance the traffic travelled over their respective railways, or in such proportions as might be agreed on between them, or in case of difference as should be settled by the arbitrator. The Caledonian company therefore maintain that the question raised by this application falls to be determined by the arbitrator, and not by the Railway Commissioners. This objection would have had more force had the question before us been one between the North British company and the Caledonian company without any other interest being involved. But that is not so. The leading applicants here are the Forth Bridge company, who could not appeal to the sections of the Act of 1866, which are sections obviously intended to protect the interests of the North British company either endangered or threatened by the amalgamation to effect which the Act of 1866 was passed. The Great North of Scotland company are also entitled to be heard for their interest under

the present application, but would have no *locus standi* before the arbitrator under the Act of 1866. What is remitted to the arbitrator by the sections founded on, is the question of apportionment of the residue of the rates as between the North British company and the Caledonian company after deduction has been made as already mentioned. That, however, is not the question we are now asked to determine. We are not asked to apportion any through rate, or the residue of any through rate, between the North British company and the Caledonian company, but to apportion a through rate as between forwarding companies engaged in the east coast traffic. That has not been remitted to the arbitrator, and I think, therefore, that this objection cannot be sustained.

The second objection maintained on behalf of both respondents is that the Commissioners cannot deal with this application, founded as it is on sub-section 8 of section 25 of the Act of 1888, because the statutory requirements precedent of any such application have not been complied with by the applicants. The first sub-section of the 25th section provides that "the company or person requiring the traffic to be forwarded, shall give written notice of the proposed through rate to each forwarding company stating both its amount and the route by which the traffic is proposed to be forwarded; and when a company gives such notice, it shall also state the apportionment of the through rate." Provision is also made for written notice being given in answer by the forwarding companies whether they agree or object to the proposed new through route and rate. Now, it is admitted that no written notice was sent by the applicants to the respondents or any other company under the sub-section I have quoted, at the time the new route for east coast traffic was opened by the Forth Bridge. Mr. Conacher in his evidence states: "No notice has been given in terms of section 25 of the Act of 1888." This, of course, means no written notice, for a notice of a different kind was given. What was done was this: At meetings held by the railway superintendents and railway managers at the railway clearing-house in 1890 (the minutes of which are before us), it was intimated on behalf of the applicants that the Forth

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Bridge had been opened for traffic, and that all the through rates and fares then in force by the Granton and Alloa routes were discontinued and applied to the Forth Bridge route. The proportion of the through rates and fares claimed by the applicants was also intimated. There was thus given to all the forwarding companies a notice which included the three items of which notice is required by statute to be given, namely, (1) the proposed through route (by the Forth Bridge); (2) the proposed through rates and fares (those in force at the time without alteration); and (3) the proportion claimed by the applicants (the rates and fares effeiring to a length of 19 miles in addition to their actual mileage). Now if it be essential under the statutory provision that *written* notice shall be given by the company proposing the new route and rate to all the other forwarding companies, the applicants must fail, for such notice has admittedly not been given. I strongly incline to the opinion that it is not essential. The statute provides for a written notice, no doubt, but I do not think it makes writing a solemnity, a thing for which no equivalent will suffice, or with which all parties interested may not dispense. It may be that the direction that the notice should be written was (especially in the case of an individual requiring through traffic, a power by this Act for the first time conferred on individuals) to prevent any misunderstanding which might arise from merely verbal communings. But what certainly is required in cases where two or more companies are concerned (which is the case here) is that information shall be given to the forwarding companies of three things, namely, the route and rate proposed, and the proportion of the rate claimed by the company making the proposal. This information was given by the applicants to the respondents among others interested, and was given in such a way and at such a place and time as left a written record of the proposal which could be afterwards referred to if necessary. It is not pretended by the respondents that the want of written notice, specially addressed to them, has left them in any ignorance or doubt as to the applicants' proposal. They understood it perfectly; they have acted on it for several years. Nor do they

pretend that they have any objection to the proposal as regards route or rate—they do object to the proposed apportionment of the rate, but to that only. On consideration of the special circumstances of this case, I am not prepared to sustain this objection.

Now, with regard to the merits of the application. It is an application for the apportionment of “agreed-on rates.” The respondents say that no rates were “agreed on.” In a sense this is true; there was no formal agreement that the rates previously charged by the Alloa and Granton routes should be adopted by the Forth Bridge route. In another sense the rates are “agreed on”; for that which has been acted on for several years without objection may fairly enough be described as “agreed to.” In this, as in many other things, silence may be taken as equivalent to consent. But the agreement which is deduced from mere silence or want of objection has no degree of permanency, because the silence may be broken and objection stated at any time. Accordingly, if either of the respondents stated now or to-morrow an objection to the present rates, the agreement would be at an end, and any order pronounced by the Commissioners with regard to the apportionment of the rates hitherto agreed on would be futile. If the rates are not “agreed on” there can be no apportionment of “agreed-on” rates. This presents the first difficulty in the way of the applicants obtaining the order for which they ask. But there is another difficulty in their way. The applicants ask for an order of the most general kind—apportioning all agreed-on rates for traffic “passing *viâ* the Forth Bridge from any station on the Great North of Scotland railway and on the Caledonian railway between Aberdeen and Kinnaber Junction on the one hand, and stations south of the Forth Bridge on the other.” Now, having regard to the penalties with which an order is enforceable, I think that what it enjoins ought in every case to be as certain and free from ambiguity as possible, and that if an order has for its subject an apportionment of rates, it should describe the rates apportioned in such a way that no mistake can be made in identifying them. Orders of this class have usually done this by specifying the amount of the through rate, the points of

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arrival and departure of the route, and the several forwarding companies. To describe, therefore, the rates intended to come under the order simply as being "all agreed-on rates for traffic passing *viâ* Forth Bridge between Great North and Caledonian stations, on the one hand, and stations south of the Forth, on the other," would, I think, be too indefinite. I am not disposed to alter the course hitherto taken in apportioning, of requiring full particulars of the rates proposed for apportionment, or to grant an application which involves dealing with rates *per aversionem*.

I am therefore of opinion that the application must be refused *in hoc statu*.

SIR FREDERICK PEEL : This is an application that as regards all traffic *viâ* the Forth Bridge railway between Great North or Caledonian stations on the one hand, and stations south of the Forth on the other, the through receipts may be divided by mileage, and that in the division as between the respondents and the applicants 23 miles 16 chains may be taken as the mileage of the Forth Bridge railway.

The actual length of that railway is 4 miles 16 chains, but it is provided by the Acts which authorised its construction that the mileage chargeable for the use of it shall be increased by 19 miles ; and it is also provided by the North British Rates and Charges Act, 1892, that in calculating the distance over which merchandise is conveyed, the Forth Bridge railway is to be calculated at 23 miles 16 chains.

The Railway Traffic Act, 1888, s. 25, sub-s. 8, directs us in apportioning a through rate to take into consideration "all the circumstances of the case, including any special expense incurred in respect of the construction of any part of the through route, as well as any special charges which a company may have been entitled to make in respect thereof" ; and the great cost at which the Forth Bridge railway was constructed would probably justify us in deciding that the North British proportion of a through rate in respect of the Forth Bridge railway should be what the mileage of that railway as lengthened by the addition of the 19 miles would give it. It

is, however, clear that the effect of giving the bonus mileage in the division of "all rates on traffic passing *via* the Forth Bridge railway between Caledonian or Great North stations on the one hand, and stations south of the Forth on the other," would not be confined to the two respondent companies, but would leave a less sum to be divided between all other companies interested, and that they would each receive a less sum per mile for their respective distances. And as these other companies have been given no opportunity of appearing in opposition to this application, I think that all through rates to which other companies as well as the Caledonian and Great North are parties must be left out of consideration, as we could not make an order by which any company which has not been before us would be affected prejudicially.

As regards the rest of the rates, those, namely, in which no companies but the defendants are interested, the Caledonian say in their answer that the rates are not through or agreed-on rates as regards being joined in by them, for that the North British exercise running powers over the Caledonian line from Kinnaber Junction to Aberdeen, and fix the rates for that part of the route. Mr. Conacher, however, denies that any of the existing through rates have been made chargeable under the powers given to the North British by the Scottish North-Eastern Amalgamation Act, 1866, or otherwise than with the implied consent of the Caledonian company. And it seems that in 1890, two months before the Forth Bridge railway was opened, the North British gave notice through the clearing-house that the rates which had been in force with the consent of the Caledonian and other companies by the routes in use up to that date, would thenceforth be transferred and made applicable to the new Forth Bridge route, and that they intended to claim to be allowed the bonus mileage in the division of through receipts, and that no company took exception to traffic being sent by the new route at the old rates, but that the Caledonian and Highland companies did at once dissent to the bonus mileage being given, and later on in the same year the Great North also. In the regular course, in the case of a rate considered by the North British to be Caledonian for part of the route, the Caledonian company would have had written

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notice to say whether it agreed; and where the rate as to that part of the route might be either Caledonian or North British, the notice that would have made it clear that it was considered to be Caledonian should have been given in the form prescribed by the Act.

It is contended by both the Caledonian and the Great North, that a notice of proposed through rates and their apportionment given only to the clearing-house, is not a compliance with the requirements of section 25, sub-section 1 of the Act of 1888, and that a compliance is necessary to give us jurisdiction to apportion. Even, however, assuming that the notice required to be given to each forwarding company was in this case sufficiently given by the notice to the clearing-house, there are other things required by that section, with a view to our acting under it, which the applicants have not sufficiently attended to. They want us to apportion rates, of which all we are told is that they are agreed-on rates *vid* the Forth Bridge railway between Caledonian or Great North stations and stations south of the Forth. They show us nothing specific about the rates, their amount, for instance, or the termini for each rate, or the route between them, for there may be more than one route between the same termini. But it is not in accordance with the practice hitherto invariably followed by the Railway Commission that particulars such as these should not be given, or that it should not be possible to set them out in any order that may be made; and as I see no reason for allowing rates to be described with less precision in this case than in others, I think this application, and the similar one relating to the Tay viaduct, should be refused.

LORD COBHAM : I quite agree that this application should fail, on the ground, apart from the points of law raised, that the rates applied for have been insufficiently discriminated.

[Solicitor for the Forth Bridge railway company: *White Millar*, Edinburgh.]

Solicitor for the North British railway company: *James Watson*, Edinburgh.

Solicitors for the Great North of Scotland railway company: 1897, 1898.
Gordon, Falconer and Fairweather, Edinburgh, for *James Ross*,
 Aberdeen.

Solicitors for the Caledonian railway company: *Grahames*,
Currey and Spens, for *H. B. Neave*, Glasgow.

Solicitors for the Highland railway company: *J. K. and*
W. P. Lindsay, Edinburgh.]

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Through Rates—Notice—Jurisdiction—Railway and Canal Traffic Act, 1888
(51 & 52 Vict. c. 25), s. 25.

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18, 19, 20.
March 10,
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December 4,
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By section 25 of the Railway and Canal Traffic Act, 1888, written notice must be given of a proposed through rate to each forwarding company stating the amount, rate, and apportionment. If no objection be made by any forwarding company within ten days the rate comes into operation. Where the objection is only to the apportionment of the rate, the rate comes into operation, and the decision of the Commissioners is to be retrospective.

On 14th January, 1890, a printed notice was addressed by the secretary of the clearing-house to the goods managers of the various companies requesting attendance at a meeting of the goods managers' Conference, and appending a list of subjects for discussion, among which was the following: "Mr. Macdougall will intimate the probable opening of the Forth Bridge railway in March next, and give notice that, in terms of the Forth Bridge Railway Acts, 1878 and 1882, the North British company (as the working company) will claim in division of receipts on traffic conveyed *viâ* the Forth Bridge an allowance as for 19 miles in addition to the actual mileage of the bridge railway." Certain of the companies interested assented to the claim so made, but others objected, and the sums in dispute were held in suspense in the clearing-house. On 19th October, 1898, the Forth Bridge company and the North British company served a notice upon all the companies interested in the Forth Bridge through route, which purported to be under section 25 of the Railway and Canal Traffic Act, 1888, setting forth that the applicants proposed and required that the through rates and fares then in operation *viâ* the Forth Bridge, and particularly those set forth in a schedule to each notice, should be continued in operation, and that the apportionment among the applicants and the other companies of the said rates and fares should be made on the footing that the Forth Bridge railway was 19 miles longer than it actually is. In the schedule were set forth a selection of the through rates then in operation *viâ* the Forth Bridge between certain stations of the company receiving the notice and certain other stations south of the Forth Bridge. Objections having been lodged to the allowance and apportionment, the Forth Bridge company and the North British company applied to the Railway Commissioners to apportion the scheduled rates and fares, and also all other agreed-on rates and fares *viâ* the Forth Bridge, on the footing that the applicants should be credited with the said 19-mile bonus.

Held, by the Court of Session (affirming the judgment of the Railway Commissioners),

⁽¹⁾ Before Lord STORMONTH DARLING and Commissioners Sir FREDERICK PEEL and Viscount COBBAM, sitting at the Parliament House, Edinburgh.

(1) That the notice of 19th October, 1898, was a valid notice within the meaning of section 25, sub-section 1 of the Railway and Canal Traffic Act, 1888, and, therefore, that the Railway Commissioners had jurisdiction to entertain the application ;

(2) That the notice of 14th January, 1890, was not a valid notice within the meaning of the said sub-section, and, therefore, the rates in operation were not agreed-on rates, but must be granted or disallowed in the application before the Commissioners; and accordingly, as the objections before them were to the allowance as well as to the proposed apportionment, their order should not be retrospective.

The Railway and Canal Traffic Act, 1888, s. 25, sub-s. 9, enacts that " it shall not be lawful for the Commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route."

Held, by the Court of Session (affirming the judgment of the Railway Commissioners), that this provision applies only to companies which, besides having part of a through route, work another route between the termini of the through route, and are in a position to make a legal charge for which traffic may be carried from end to end of it.

THIS was an application under sections 25 and 26 of the Railway and Canal Traffic Act, 1888.

The applicants were the owning and working companies respectively of the Forth Bridge line of railway, and the application was for a bonus mileage of 19 miles. The applicants now stated that a previous application⁽¹⁾ had been dismissed, mainly on the ground that the rates asked to be apportioned were not described in the application with sufficient precision; and that they (the applicants) had therefore, on October 19th, 1898, sent the following notice, with a schedule of rates annexed thereto, to the companies interested :—

" Take notice, under and in virtue of section 25 of the Railway and Canal Traffic Act, 1888, that the Forth Bridge railway company and the North British railway company, for their respective interests, propose and require, that the through rates and fares now in operation for the conveyance of traffic *viâ* the Forth Bridge be continued in operation, and, without prejudice to the foresaid generality, the Forth Bridge railway company and the North British railway company, for their respective interests, propose and require the through rates and fares *viâ* the Forth Bridge, set forth in the schedule hereto

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annexed, all said through rates and fares so set forth being through rates and fares now in operation. The Forth Bridge railway company and the North British railway company, for their respective interests, further propose, that all the above-mentioned through rates and fares, including those set forth in said schedule, shall be apportioned and divided between the Forth Bridge railway company and the North British railway company, in respect of the Forth Bridge, on the one hand, and the Great North of Scotland railway company, and all other railway companies interested in the said rates, on the other hand, on the footing that the Forth Bridge railway company and the North British railway company shall receive in every case out of the said rates such sum as they would be entitled to receive if the distance traversed by such traffic over the Forth Bridge were 19 miles more than it actually is.

"This notice is given without prejudice to the whole contentions and pleas of the Forth Bridge railway company and the North British railway company before the Court of the Railway and Canal Commission and otherwise, including their contention that all through rates and fares which have been in operation *viâ* the Forth Bridge since the opening thereof, have been so by agreement between the Forth Bridge railway company and the North British railway company on the one hand, and all the companies interested, on the other hand, and that before the opening of the Forth Bridge route due notice was given that the Forth Bridge railway company and the North British railway company claimed in the apportionment and division of such rates the statutory bonus mileage of 19 miles."

In the schedule annexed to the notice the applicants set forth a selection of rates, fares, and routes as representative of the rates and fares generally *viâ* the Forth Bridge, of which there were some hundreds of thousands.

The applicants stated that to this notice they had received replies from the respondents the Great North of Scotland, the Highland, the Caledonian, and the Lancashire and Yorkshire railway companies, objecting to the proposed through rates and fares, and also to the proposed division of them, on the grounds that the rates and fares did not include and were not based on

any sum chargeable, under the Forth Bridge Railway Acts or otherwise, in respect of the 19 miles bonus authorised to be charged against the public in respect of the Forth Bridge; and, further, that if the proposal was given effect to, the mileage rates receivable by the respondents in respect of the traffic in question would be insufficient, and less than mileage rates they were legally charging for like traffic carried by a like mode of transit on other lines of communication between the same points, being the points of departure and arrival of the through rate⁽¹⁾; and also that the route mentioned over the system of the North British railway company was not the shortest route afforded by the system of that company for the conveyance of the traffic in question, and therefore ought not to be made the basis of an order of the Commissioners as regards through rates under the Railway and Canal Traffic Act, 1888.

The applicants further stated in their application that all the rates and fares proposed were then in operation by the Forth Bridge route, and that, with certain modifications made from time to time by consent of all the companies interested, they had been so ever since the Forth Bridge route was opened. They now asked the Court to apportion all the rates and fares set forth in the schedules and all other agreed-on rates and fares, in respect of the great expense incurred in the construction, maintenance, and working of the Forth Bridge, and in respect of the powers to charge bonus mileage conferred on the Forth Bridge company, on the basis of a 19-mile bonus; and if it should be necessary that the amounts of the proposed through rates or fares, or any of them, and the route by which the traffic was to be forwarded should be determined as well as the apportionment, then they asked the Court to allow the proposed rates, fares, and route.

The applicants annexed a schedule to the application, setting forth the division amongst the various railway companies interested of a selection of the proposed through rates and fares, and showing the proportions of the rates and fares falling

(¹) See Railway and Canal Traffic Act, 1888, s. 25, sub-s. 9, in headnote.

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to each company, with and without the bonus claimed by the applicants in respect of the Forth Bridge.

The respondents, the Great North of Scotland company, contended in their "answer" that the necessary procedure under sections 25 and 26 of the Railway and Canal Traffic Act, 1888, had not been carried out, and that the application was incompetent; in particular, it was incompetent in so far as it purported to submit to the Commission the determination of questions (1) as to receipts already accrued, as to which the Commission had no jurisdiction, (2) as to passenger fares, whereas the Act of 1888 was confined to merchandise traffic. They further complained that the notice sent was insufficient as an intimation of the through rates required for the future, since it did not state the apportionment of any of the through rates and fares.

The respondents, the Highland railway company, contended that the effect of granting the application would be a contravention of sub-section 9 of section 25 of the Railway and Canal Traffic Act, 1888 ⁽¹⁾. Both these companies chiefly relied on the contention that the extra charge ought first to be made against the public by the North British railway company on behalf of the Forth Bridge company.

The Caledonian railway company were owners of a line between Aberdeen and Perth, over which the North British company had running powers, and the North British company were authorised to fix rates and fares for all Scottish east coast traffic; the Caledonian company contended that the Forth Bridge bonus did not affect the payments to be made them by the North British company in respect of such running powers. They had a further objection to the proposed change of traffic at Kinnaber Junction, as not possessing adequate accommodation.

At the hearing the following agreement was put in: "The applicants agree that any apportionment of through rates and fares to be made by the Commission on traffic passing *viâ* the Forth Bridge should only apply in so far as such through rates and fares are divisible by mileage *viâ* the said bridge, and without prejudice to all or any statutory enactments, statutory

⁽¹⁾ See headnote.

or private or other agreements or arrangements, and the regulations of the railway clearing-house affecting the apportionment or division of such through rates and fares."

Dean of Faculty (Asher, Q.C.) and Cooper appeared for the applicants.

Lord Advocate (Graham Murray, Q.C.) and J. B. Balfour, Q.C., and Nicolson, appeared for the Caledonian railway company.

Lord Advocate and Solicitor-General (Scott Dickson, Q.C.), and Ferguson, appeared for the Great North of Scotland railway company.

Johnston, Q.C., and Macphail appeared for the Highland railway company.

The further facts, and the arguments of counsel, appear from the following judgments:—

LORD STORMONTH DARLING: A former application to this Court by the Forth Bridge and North British railway companies directed solely against the Great North of Scotland and Caledonian companies, and having for its object the apportionment of "agreed-on rates for traffic passing *via* the Forth Bridge between stations on the Great North of Scotland railway and on the Caledonian railway between Aberdeen and Kinnaber Junction on the one hand, and stations south of the Forth Bridge on the other," was, on 26th January, 1898, dismissed, on the ground that applicants had not sufficiently specified the rates to be apportioned—various matters were discussed in the opinions then delivered, but want of specification was the ground of judgment. A similar application with regard to the Tay Bridge was dealt with in the same way.

Accordingly, the applicants have presented the present applications against all the companies interested, setting forth particular through rates and fares which are now in operation, and which, they say, are representative in their character, and asking us to apportion these, as well as all other agreed-on rates

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and fares on traffic passing over the bridges, in such a way as to give the applicants the benefit of a bonus mileage of 19 miles as regards the Forth Bridge, and 10 miles as regards the Tay Bridge. The applications were preceded by formal written notices addressed to each of the respondent companies proposing and requiring that the through rates and fares then in operation, and (without prejudice to that generality) the through rates and fares set forth in the schedules annexed to the notices, should be continued in operation, and should be apportioned and divided on the footing of the bonus mileage—counter-notices were sent by the three objecting companies, the Caledonian, the Great North, and the Highland, and, in case it should be thought necessary in consequence of these counter-notices that rates and routes should be fixed by this Court as well as apportioned, the applicants ask us to allow the proposed rates and routes. The applicants' notices were sent, and the present applications are presented under express reservation of their plea that all through rates and fares which have been in operation since the opening of the bridges have been so by agreement among all the companies interested, and that, before the opening of the bridges, due notice was given that the applicants claimed in apportionment the benefit of the bonus mileage.

The through rates and fares with which we are asked to deal are thus in three distinct categories: (1) those which are scheduled and specifically described; (2) those which are not scheduled but are now in operation; and (3) those which have been in operation since the opening of the bridges, and with respect to which the sums in question between the applicants and the objecting companies have been carried to a suspense account in the clearing-house, representing in the aggregate a sum of about 15,000*l*.

I am of opinion that we ought to deal only with the first of these categories. To deal with the second would be to go in the face of the decision of this Court in the former application. I readily accept the statement of Mr. Conacher, which, indeed, was hardly controverted, that to set out in a schedule every through rate applicable to traffic passing over these bridges, from the extreme north of Scotland to the extreme south of

England, would be an operation so laborious as to be out of all proportion to the end in view. But we are relieved from all anxiety as to the practical effect of confining ourselves to the scheduled rates by the perfectly frank and proper concession of the Lord Advocate, that the settling of particular rates would be accepted as "embodying a principle" (that, I think, was the Lord Advocate's phrase), and that other through rates raising no difference in principle would be treated by the companies themselves as ruled by our decision.

With regard to the third category, viz., the sums in dispute which have been accumulated in a suspense account, it is conceded by the applicants that our right to deal with these depends entirely on the sufficiency of the notice, or equivalent of a notice, which was given by the applicants before the bridges were opened. And here it may be convenient to test the question by reference to what took place in 1890, shortly before the opening of the Forth Bridge. The facts upon this matter have been more fully explicated in the present than they were in the former proceedings. In particular, one of the agenda-papers for a clearing-house meeting has been recovered. It is a printed notice addressed by the secretary of the clearing-house, on 14th January, 1890, to the goods manager of the Great North company. It requests him to attend a meeting of the goods managers' conference to be held at the clearing-house on 23rd January of that year; and it appends a list of subjects for discussion. One of these is in the following terms: "Mr. Macdougall will intimate the probable opening of the Forth Bridge railway in March next, and give notice that, in terms of the Forth Bridge Railway Acts, 1878 and 1882, the North British company (as the working company) will claim in division of receipts on traffic conveyed *via* the Forth Bridge an allowance as for 19 miles in addition to the actual mileage of the bridge railway." I think we may assume that similar agenda-papers were sent out to the other goods managers. Next it appears from the minutes, that at the goods managers' conference on 23rd January, Mr. Macdougall did make his intimation, and that it was agreed to by the conference, under dissent from the representatives of the Caledonian and Highland companies.

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It further appears that the same notice was given at the superintendents' conference on 23rd January, with the same result; that the general managers' conference on 6th February approved and adopted the minutes of the other two conferences; and that, at a subsequent stage, the Great North company joined in the dissent of the Caledonian and Highland companies.

Now all this is quite consistent with the undoubted fact that the North British company has, from the first, claimed the benefit of the bonus mileage in the division of receipts on traffic passing over the Forth Bridge, that the claim has been allowed by the majority of the companies interested, and it has been disputed by the three companies who are here objecting. But that affords no ground for holding that anything done in connection with these meetings constituted a written notice in terms of section 25 of the Traffic Act of 1888, with the peremptory and stringent results arising therefrom. The applicants say that the agenda-paper constituted such a notice. I cannot assent to that view, which received no countenance from any member of this Court on the last occasion. The agenda-paper did not fulfil the statutory requirements; it was not addressed to the company, it did not state the amount of any through rate; it did not even specify the route; it spoke merely on the most general terms of "receipts on traffic conveyed *via* the Forth Bridge." How could any company know, merely because their officials had been summoned in the usual way to an ordinary meeting, at which a question of bonus mileage was, *inter alia*, to be discussed, that this was a challenge to them to say whether they were to agree to a whole series of through rates, under the penalty that, if they did not object within ten days, or obtain an extension of time from this Court, every one of these rates would come into operation at the expiration of that period? But, even if these agenda-papers were to be held as fulfilling the statutory requirements in other respects, it would be a fatal objection to them that they did not specify a single through-rate. On that ground alone we must hold them insufficient, because to do anything else would be inconsistent with our former judgment. If we are not to deal with unspecified rates as regards the future, it is plainly impossible that we can do so as regards the past.

The applicants maintained an alternative argument that if these were not statutory notices, the necessity for such notice was dispensed with. I am willing to assume that the companies interested might have dispensed with written notice by distinct agreement to that effect. But, in my judgment, the first condition of any such waiver would be that they had the provisions of the statute in view, and knew that the North British company was laying the foundation for an application under section 25. If, in that knowledge, they had said, "We know exactly what you propose: don't go through the form of sending us a statutory notice; we shall act as if you had done so," it might perhaps have been pedantic to insist on literal compliance with the statutory procedure. But, in the fuller light of the evidence now before us, I think it impossible to say that any of the companies concerned, including the North British itself, ever bestowed a thought on the statute, or intended that what passed at those clearing-house meetings should be held either as a compliance with, or a substitute for, its provisions. Probably they all regarded through rates as inevitable, and recognised that their amount was practically determined by the existence of competitive routes; but that is quite a different thing from a consent on the part of the respondent companies that statutory provisions in their favour should be waived, in the event of its being necessary to resort to this Commission for the determination of disputes. I hold, therefore, that we cannot competently deal with any through rates or fares except those which were specified in the written notices of 19th of October, 1898.

An objection was stated even to these notices, to the effect that they did not sufficiently inform the respondents what their own share of the proposed apportionment would be. But this, I think, is a captious objection, and ought not to be sustained.

Coming now to what may be termed the merits of the applications, the first question is whether the scheduled rates ought to be allowed as well as apportioned; and I think they ought to be. Objections have been stated by some of them, which may be said to be objections rather to the apportioning than to the granting of them; but it will put the matter on a more secure basis if we formally allow them, and there is no real dispute

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either as to the propriety of having through rates by these routes or as to their amount, because they have been in full operation for nearly nine years. The special objection urged by the Caledonian company with regard to the position of their line between Kinnaber Junction and Aberdeen does not impress me. The powers of fixing rates conferred on the North British company by the amalgamation Act of 1866 have never been exercised, and there is no proposal to exchange more traffic at Kinnaber than is done at present without the least inconvenience.

The next, and really important, question is as to the apportionment of the proposed through rates. And here the applicants put their case alternatively—(1) on section 13 of the Forth Bridge Act of 1878 ⁽¹⁾, which, they say, contains a statutory direction to apportion, as against all the world, in a particular way; and (2) on our discretionary powers under section 25 (8) of the Traffic Act of 1888.

Now, I demur entirely to the notion that applications, which are made expressly in terms of the Act of 1888, can be turned into a sort of declarator that, under and by virtue of a different Act altogether, the applicants are entitled to have all through rates apportioned in a particular way. Our jurisdiction under the Traffic Act is a purely discretionary one. We are directed to “take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or working of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof.” That requires us to take note of the fact that the construction of these bridges cost millions of money, that their maintenance is likewise much more expensive than that of an ordinary line of railway, and that the applicants were authorised to make special charges for traffic, whether such charges have been actually made or not. But we are bound also to have regard to all the circumstances of the case, and the weight to be attached to any one of these elements is left entirely to our discretion. Now, if there be some other Act of Parliament prescribing a positive and absolute

(¹) See p. 31.

rule of apportionment for all traffic passing over these bridges, it is obvious that our discretionary jurisdiction (and we have no other) would be entirely displaced. If the applicants are right in their construction of the Forth Bridge Act of 1878, their proper course was not to come to us, but to bring an action of declarator in a Court of law. Accordingly, I do not think that we are bound to express any opinion on the construction of that Act; but since the question was very fully and ably argued, I may perhaps be allowed to say that I am not convinced by the applicants' argument, and that the words of section 13 seem to me quite consistent with the notion that it provides a rule of division only for the four companies which are directly interested in the Forth Bridge, and at whose instance the Act was obtained. If this be a reasonable mode of construing the section, I need not point out that it is much more in accordance with the ordinary rules of construction applicable to private Acts of Parliament than it would be to hold that the interests of third parties are vitally affected thereby.

Are we, then, in the exercise of our discretion, to allow this *bonus* mileage or not? The figures showing the enormous cost of these bridges, even when compared with (let us say) so exceptionally expensive a line as the Aviemore section of the Highland railway, cannot, of course, be controverted. The main reason urged by the respondents against allowing the extra mileage is that the applicants have not charged it against the public. This fact presents no obstacle in law, because the statute says that we are to take into consideration special charges which any company "may have been entitled to make." But it is a perfectly proper consideration for the respondents to urge; and, if there were anything capricious or unfair in the failure to make the charge against the public, that might be a good reason for our refusing to throw the burden on the respondents. It is plain, however, that to make such a charge on a competitive route would be suicidal. The respondents' rejoinder practically is that it would not matter to them though the competitive character of the route were destroyed. The Great North and the Highland companies say that the volume of their traffic has not been increased by the erection of these

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bridges; that passengers may be attracted by them, but that goods would have come all the same by other routes if the bridges had never existed. I take leave to doubt whether passenger traffic can ever be substantially increased without goods traffic following in its wake. But these are considerations which leave out of account the interests of the public. If through fares by a particular route are desirable from that point of view, it may be right—in this case I think it is right—that companies which (roughly speaking) have spent three millions of money in making two miles at one part of the route, and 800,000*l.* in making two miles at another part, should receive, in the division of the rates, some compensation for that quite extraordinary expenditure. And I say so, after giving all due weight to the considerations forcibly urged by the two Northern companies with regard to the cost of their own lines, the kind of country they traverse, the sort of traffic at their command, and the powers which they possess of making higher charges than they actually do make.

With regard to the argument which was addressed to us on sub-section 9 of section 25 of the Traffic Act as limiting our powers of apportionment, I have had the advantage of reading Sir Frederick Peel's opinion, and I concur in the view of that sub-section which he there expresses.

I propose, therefore, with regard to each of the bridges, that we should allow the through rates and fares set out in the schedules appended to the respective applications, and that we should apportion these in the manner proposed by the applicants, but subject to the qualifications set out in each of the minutes which were lodged in the course of the proceedings. Where rates are allowed as well as apportioned, the apportionment cannot be retrospective, but under section 25 (7) it will date from the giving of the decision; that is, from to-day.

SIR FREDERICK PEEL: These are applications to us under section 25 of the Traffic Act, 1888, to grant and apportion through rates and fares *vid* the Forth Bridge, or *vid* the Forth and Tay bridges, and in the division of receipts to treat the length of each bridge-railway as being greater than it really is.

The North British own, as well as work, the Tay Bridge railway, and they work, though they do not own, that over the Forth. The application in the Forth Bridge case is made jointly by them and the owning company, and in that of the Tay Bridge by the North British only. The North British have also running and other powers over the Scottish North-Eastern railway, of which the Caledonian company are the owners, by virtue of the Caledonian and Scottish North-Eastern Railways Amalgamation Act, 1866, and the Kinnaber to Aberdeen section of which is part of the proposed through routes; and the Caledonian company say that as through traffic passing over the Scottish North-Eastern railway is forwarded with all due and reasonable facilities by the North British company under the powers referred to, no occasion has existed for asking for any facilities from the Caledonian company, and that, *quoad* that company, therefore, the application ought to be dismissed. But I think that as the owners of the Scottish North-Eastern, and as working its local traffic and any through traffic that is not Scottish east coast, and as interested in the *quantum* of the portion of a through rate which may be due to that line, they answer the description of a forwarding company under section 25 of the Traffic Act, 1888 (see the view of the Court of Session in *Greenock and Wemyss Bay Company v. Caledonian Company*⁽¹⁾), and that it was necessary they should be served with notice of the proposed through rates, and be one of the parties before us in these proceedings.

The Forth Bridge application (to begin with that) has reference first to all through rates and fares *via* the bridge from the time of its opening in 1890, every such rate and fare being included in the notice given in January, 1890, by the North British, as the working company, to the clearing-house, and by the clearing-house to other companies by sending them an agenda-paper, and also in the more formal notice sent in October, 1898, to each forwarding company by the North British and Forth Bridge companies; and secondly, in case it should be considered that some sort of specification of rates and fares proposed for apportionment is necessary, then

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⁽¹⁾ *Ante*, Vol. III., p. 145.

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to such rates and fares as are specifically named in schedules annexed to the notices of last October. The length claimed for the railway across the Forth is a 19 miles addition to actual distance, and the applicants say that as regards all rates and fares which are divided in the clearing-house on the equal mileage principle, a division in which that bonus mileage is taken into account is made with the consent of all the companies interested, except the three who are respondents in these cases, and whose share therefore of such part of each through rate or fare as corresponds to the proportion of the bonus mileage to the whole distance of the through route is for the present held in suspense in the clearing-house, instead of, like the shares of other companies, being paid to the applicants.

Now it is a condition precedent to any application for a through rate and its apportionment, that each forwarding company should receive a written notice of the proposed rate, route, and apportionment, and the first ground on which the respondents oppose the granting of the Forth Bridge application in either of its branches, is that the notices on which the applicants rely as satisfying the Act do not fulfil its requirements. As respects the notice given in 1890, the objection made to it is the same as was made to it in the case between the same applicants and the Caledonian and Great North of Scotland companies, which we heard in 1897. The North British and Forth Bridge companies there stated that a large number of agreed-on rates were by agreement in operation for traffic passing *viâ* the Forth Bridge between stations on the Great North, or on the Aberdeen to Kinnaber section of the Caledonian railway, on the one hand, and stations south of the Forth, on the other, and that the Caledonian and Great North of Scotland companies would not agree to a division of through receipts giving the North British and Forth Bridge companies any larger share on account of the bridge railway than was due to its actual mileage, and they asked us to determine that receipts from traffic conveyed *viâ* the Forth Bridge ought, in the circumstances, to be divided on the footing of including the extra 19 miles in calculating the mileage of that railway. It was contended in answer, that the notice through the

clearing-house, on which the applicants rested their demand, was invalid as a notice under the Act, on the twofold ground that it was not issued in the prescribed form, and that it did not give any particulars of the proposed rates or routes. In the result, the Court, though not thinking the applicants in the wrong on the first of these grounds, on which the validity of the notice of 1890 was impugned, were, on the second of them, of opinion that a demand for a general rule of division to apply to rates in gross, as distinguished from an apportionment of specific rates, could not be granted. In the present case the same applicants again ask that all through rates and fares which have been in operation *viâ* the Forth Bridge since it was opened may be apportioned as rates of which due notice was given in 1890, and they further ask that, failing their application to have these rates apportioned under the notice of 1890, we will allow and apportion them under the notice of 1898. It is urged in opposition that the notice of 1890 is inadmissible as a notice under section 25, sub-section 1 of the Traffic Act, and that in addition the proposed through rates are, both in the 1890 notice and in that of 1898, no further indicated than as being all rates from 1890 for traffic passing *viâ* the bridge, and that conformably to what was decided in the former case, this first branch of the application ought to be dismissed, on the ground that the proposed rates are not specified in either notice with the degree of detail to which forwarding companies are entitled by the Act. I am of opinion that, on the reasoning of the judgment on this point in the former case, this part of the present application should be refused.

As to the other branch, that relating to rates and fares specified in the notice of 1898, this notice also is said to be defective for uncertainty, as it only asks for a proportion for the Forth Bridge railway as for 19 miles in addition to actual mileage, and fails to show what amount of each through rate or fare each forwarding company is to have allotted to it. But I think, if the different companies' shares can be inferred from what a notice states under the head of apportionment, the statement is in manner and substance sufficient for the words of the sub-section. Now what was proposed in these notices

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was expressly said to be the continuance of rates and fares already in operation. The companies, therefore, knowing the proportions which they had respectively been receiving out of these rates through the clearing-house, would, as to such of them as by the clearing-house rules were divisible by the mileage of the Bridge route, know what difference the lengthening of that route, by reckoning the Forth Bridge portion of it as 19 miles longer than before, would make in what they would get in future. The notices, therefore, as to this class of rates do in effect furnish the information intended by the Act, and if they left it uncertain as to what was proposed when rates and fares *viâ* the Forth Bridge route were being divided by the mileage of some shorter route within the North British system, or were not divisible by equal mileage owing to some agreement or usage, as, for example, where the division was made *pro ratâ* to local charges, or in proportions fixed by agreement, we have not now to go into the question of the notices as it is concerned with them, because the applicants, in the course of the hearing, agreed not to ask us to apportion rates and fares not divisible by the mileage of the Forth Bridge route, nor to apportion in such a way as would override or set aside any enactments, agreements, or clearing-house rules at variance with our apportionment. We deal, therefore, only with rates and fares *viâ* the Forth Bridge route, and divisible by that route, and named in the schedules to the notices, and also not otherwise than subject to the limitations or exceptions desired by the applicants. And, first, as to the proposed rates and routes, they are the same as those which have been in use in the past and are still in actual use, and though the respondents oppose the granting of them, the grounds on which they do so are really objections to the traffic receipts being divided in the manner applied for. I think, therefore, they should be allowed. As to apportionment, the applicants rest their view of the reasonableness of their claim to the bonus mileage upon the difference of cost in construction between their part and every other part of each through route, and upon the ground also that they have been accorded by their Acts power to make special charges in consideration

of that cost; and these are circumstances to which the Traffic Act, 1888, directs us to have regard in apportioning a through rate. But they found themselves also upon sections 13 and 14 of the Forth Bridge Act of 1878 ⁽¹⁾, where, as they point out, it is provided, as to the division of all through charges, that their bonus mileage, along with certain other sums, shall be first deducted out of each through charge, and the residue divided at the same sum per mile among the companies interested. I am, however, unable to adopt the view as to the effect of these sections suggested by counsel for the applicants. Assuming the through charges, with which the sections are concerned, to include the rates we are asked to grant and apportion, the rule they lay down of equal mileage division is, I think, applicable only to the Forth Bridge company and the four guaranteeing companies, and has no reference to companies in the position of the respondents. They belong to the category of "the other companies" mentioned in section 13, to whom the sums due (due, that is, as their portions of the through charges) are, like the bonus allowance, to be taken out of each rate or fare before division. Each of these deductions is independent of the other, and the sections do nothing towards determining the amount of the sums due. There are said to be expressions in the lines at the end of section 13 inconsistent

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(1) The Forth Bridge Railway Act, 1878 (41 Vict. c. lxxiv.).

Section 2 defines the expression, "the four companies," as meaning, the North British, Midland, North-Eastern and Great Northern railway companies.

Section 13 enacts: "The through charges for the conveyance of all traffic (other than traffic which the North British railway company shall be entitled to send free of charge, in respect of the said yearly sum of thirty thousand pounds, and the commuted toll for diverted traffic) from, to, or over the Forth Bridge railways, in connection with the railways of the four companies, or any or either of them, or on railways beyond the railways of any or either of them, shall (after deducting Government duty, sums due to other companies, and the clearing-house terminals, and where the clearing-house may not fix terminals, such as may be agreed on, or in case of difference as may be fixed by arbitration, and the rates and fares for the extra mileage chargeable for the use of the Forth Bridge and Tay Bridge respectively) be apportioned among the owners of the several railways used (including the company) by an equal mileage rate, for the total distance for which such traffic shall be conveyed upon the respective railways used."

Section 14 fixes the extra mileage to be charged for the use of the Forth Bridge, at 10 miles for certain local traffic, and at 19 miles for all other traffic.

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with this view of its earlier part; but that "the owners of the several railways used" or "the respective railways used" spoken of in those lines mean the Forth Bridge and the four guaranteeing companies, and no others, was, I think, made clear by the Lord Advocate speaking for the Caledonian. Furthermore, it is contended on behalf of the Great North of Scotland and the Highland companies, upon the words of section 13, that an extra mileage, though chargeable, does not accrue at all, unless it is actually charged against the public, unless, that is, rates and fares are charged for it *eo nomine*, and form an integral part of the through charges, and that no such bonus charges are included in the scheduled rates. The contention might deserve consideration if the question was as to the division of through charges between the guaranteeing companies, but the point has nothing to do, in my judgment, with rates coming into operation under the Traffic Act, 1888, because such rates are not, like agreed rates, a combination of local rates, or calculated upon the separate charges or powers of charge of the different forwarding companies, but are independent of them, and are a single sum for the entire route, to be afterwards divided as we may think fit. As regards this discretion, there are certain statutory limits to the manner in which we may exercise it; but one limit, which counsel for the Caledonian company would impose upon us, is not, I think, amongst them. Sub-section 9 of section 25 of the Act of 1888, it was argued, prevents our giving a railway company a less rate per mile than it is charging for like traffic carried between the same points by another line of communication, whether it has the whole or part only of that line in its own hands. In my opinion, this contention is not well founded. Sub-section 9 is, I think, confined to companies which, besides having part of a through route, work another route between the termini of the through route, and are in a position to make a legal charge, for which traffic may be carried from end to end of it. Such companies became liable under the Traffic Act of 1873 to be forced to compete with themselves, and to be made partners in a rate by the through route lower than they charged by their own route; and as a check upon the amount of a

proposed through rate, where it might operate unfairly, it was provided that in the division of it they should be entitled to such a sum as would yield them a rate per mile equal at least to what they were getting over the whole distance of the route which was in their own hands. That was done to mitigate the hardship of their having to compete with themselves. This is not the case of companies which have only a link in each of two routes between the same points, and the principle of a through rate, that it is the charge for the long distance of a route which, though it may be made up of various companies' lines, is to be considered as one railway, could have no effect given to it, if not only what is due and reasonable, but the local charges also applying to different parts, large or small, of an alternative route are to be borne in mind in fixing the amount of a through rate.

On the other and more general ground on which the applicants claim to have receipts from traffic conveyed *viâ* the Forth Bridge, divided on the basis of the railway across the Forth having a length 19 miles in excess of its actual length, it is, I think, made out that the claim is not an undue one, having regard to the cost at which that railway was constructed. Its length is 4 miles 16 chains, and the sum expended on its construction amounted to 3,867,000*l.* Its part of the through routes cost probably a great deal more than any other part of equal length. The cost even of so expensive a line as the Aviemore to Inverness branch of the Highland system, 26 miles long, did not exceed a million. If the railway shares in receipts only according to its actual length, its earnings will be wholly insufficient to provide for its maintenance and to pay a 4 per cent. dividend on its capital. Even with the extra mileage added, there is no excess, on the present quantity of traffic. The applicants have an extra mileage power, and objection is taken to this circumstance being allowed to make itself felt in the division of receipts so long as the power is not used. Undoubtedly the applicants ought to show why, with this power in hand, the rates *viâ* the Forth Bridge route are no higher than were charged for like traffic conveyed by the less expensive route of the Forth Ferry. The reason, it seems, is

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that the traffic is competitive, that other routes are open to it, and that the rates in force by those other routes govern the rates which the applicants are able to charge. It may be that the respondents may in some cases get more per mile on traffic sent by an alternative route than they will get out of traffic *via* the Forth Bridge route, if the mileage of that route has the bonus mileage added to it. But what we have here chiefly to have regard to in apportioning is the part borne by the various companies in making the particular route *via* the Forth Bridge an available through route, and from this point of view it does not seem to me to be otherwise than reasonable to allow the bonus distance to be included in reckoning the mileage of the Forth Bridge railway, and I think the apportionment should be on that basis.

There is little in the Tay Bridge application to distinguish it from that relating to the Forth Bridge. The Tay Bridge railway is 2 miles 18 chains long, and the North British company, to whom it belongs, are authorised to charge as for a distance of 12 miles 18 chains. From 1877, when the present bridge was opened, down to 1892, the Caledonian was the only company dissenting from the North British receiving a mileage proportion of receipts calculated on the longer distance, but in 1892 the Highland and Great North of Scotland companies intimated to the clearing-house that they did not agree any longer to the North British receiving the 10 miles allowance. It is not objected to by any of the other companies interested, and I think the application should be granted, under the same limitations as in the Forth Bridge case.

LORD COBHAM: The respondent companies, in their answers to the applications in this case, have confined themselves mainly to legal or technical objections. These have been fully dealt with by my colleagues, and I am in entire agreement with them in their conclusions, viz., that we have jurisdiction to allow the through rates, fares, and routes asked for and specified in the schedule to the applications, and to apportion the rates and fares at our discretion, under section 25 of the Traffic Act, 1888. Thus limited, I do not think that the question before us, upon

its merits, presents much difficulty. The through rates, fares, and routes asked for are practically agreed on; at all events, no effective objection has been made to them, and they should, in my view, be allowed. In apportioning the rates and fares, we must, of course, consider all the circumstances of the case, those attaching to the respondents as well as those to the applicants. But, after giving all due weight to the former, I cannot but conclude that the difference in degree between the circumstances of the parties is so great that practically no comparison can be made between them. Taking first the case of the Forth Bridge railway. In 1873 Parliament, in giving the company powers to construct their line, authorised them to make tolls and charges upon traffic passing over the bridge for 19 miles in addition to those demandable in respect of the railways authorised by the Act. This advantage was granted in view of an estimated expenditure by the Forth Bridge company of 1,250,000*l.*, whereas the actual cost of the undertaking as carried out has been 3,367,000*l.* That this bonus cannot be regarded as extravagant is shown by the fact stated by Sir F. Peel: "That without it the company's earnings would be wholly insufficient to provide for the maintenance of the railway, and to pay a dividend of 4 per cent. upon its capital, and that even with the extra mileage added, there is no excess, on the present quantity of traffic." Further, the bonus mileage is recognised and confirmed by the North British Rates and Charges Act, 1892, under which, for all purposes of rates and charges, the Forth Bridge railway is to be calculated (excepting for some short distance traffic) at 23 miles 16 chains, instead of 4 miles 16 chains, its actual length. We are under no obligation, it is true, to follow in our apportionment the lines laid down by Parliament when they fixed the company's maximum charges, as we have other circumstances to consider. But the fact that Parliament has taken so exceptional a view of the Forth Bridge undertaking is one of the circumstances of the case to which we must give great weight. The opinion of Parliament has been in effect that the public may be fairly asked to pay charges for traffic over the bridge nearly six times in excess of the normal standard. The position of the Forth

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Bridge is thus wholly exceptional, and when the three opposing companies ask us to compare with it their circumstances, such as the cost of their railways, the scantiness of the population they serve, and the charging powers, somewhat above the ordinary level, which in some cases they possess, the relative insignificance of their case seems to me to be very apparent.

We are not, however, dealing with the Forth Bridge company alone, for the reason that the North British company has to a large extent taken its place, and is therefore joined with it in this application. The North British now work the line in perpetuity, they maintain its permanent way, and jointly with the Midland, the North-Eastern, and the Great Northern railway companies they guarantee to the Forth Bridge company 4 per cent. upon its capital. In return for this the four companies are entitled to receive the net revenues from all sources of the Forth Bridge railway, and the North British company, after providing for repayments to the other companies in respect of their guarantees, take the balance remaining. The question therefore arises whether an apportionment upon a bonus mileage basis, which could not, I think, be refused to a company working the Forth Bridge railway exclusively, should be denied to a company in the position of the North British—whether, in fact, as Mr. Johnston urged, the company are disentitled to put in a plea *ad misericordiam*. I do not see that the difference between the two companies justifies this contention. The North British company have taken over from the Forth Bridge company certain heavy responsibilities in return for a certain consideration. They have acquired, *inter alia*, the power to charge the Forth Bridge extra mileage, and I think they were right in assuming that, in doing so, they further acquired what usually follows under such circumstances, viz., the right (subject to the provisions of section 25) to an apportionment upon the basis of that power. Such an apportionment would not injure public interests, nor would it give to the North British, under existing circumstances at all events, a disproportionate profit. For at the present time, nine years after the opening of the bridge, the North British are only just

beginning to show a small direct profit under their bargain with the Forth Bridge company, after taking credit for the accumulated bonus payments now in suspense, and it must be remembered that it is for technical reasons alone that we do not deal with this fund in our order. I see therefore no adequate grounds for departing from the figures adopted by Parliament in favour of the Forth Bridge company, to the benefit of which the North British have, I consider, shown themselves entitled.

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The application relating to the Tay Bridge rates and route rests upon similar facts and principles, and I agree with my colleagues that it should be dealt with in the same manner as the joint application of the Forth Bridge and North British companies.

It is strongly contended by the respondent companies that because the bonus mileage has not been as a rule charged against the public, therefore it should be ignored in the apportionment. Such a principle has never, so far as I know, been urged or acted upon before, and no instances have been given in evidence. The original 5-mile bonus on the Forth Ferry traffic was never objected to in the apportionment of the rates, nor that on the Caledonian Alloa Bridge. If substantiated, this argument would have the effect of depriving the undertakers of works of exceptional magnitude and cost of any benefit from the bonus mileage or other special powers allowed them in all cases (and they must be frequent) in which competitive conditions prevent those powers being given effect to. This result would not be in the interest of the public, nor, I think, could it in this case have been intended by Parliament, which was aware of the limitations imposed by circumstances upon the charges of the bridge companies, and could not have meant to confer a wholly illusory benefit upon the undertakers of these great works.

In acceding to these applications, I cannot see that any special hardship is entailed upon the respondents. The applicants have established their claims to special consideration, unavoidably involving in the apportionment of through rates a reduction in the shares allottable to the other owners of the

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route. The evidence does not satisfy me that this reduction is undue in amount. It is only 2,000*l.* a year among the three companies, and it is not contended that the reduced rates will not still be remunerative. If we were dealing with actual instead of constructive mileage, it is probable that no question of apportionment would have arisen, and the various companies would have been content to share equally such disadvantages as must attach to a route subject to keenly competitive conditions. In this case, for the reasons I have given, there appear to me to be no good grounds for distinguishing between the two kinds of mileage, and an order should be granted for an apportionment framed upon this basis, subject to the limitations defined by my colleagues.

The Court upon this judgment issued the following Order :—

“ This Court doth find and determine that the granting of through rates and fares for the traffic referred to in the applicants’ said notices of the 19th day of October, 1898, as set forth in the schedules thereto annexed, is a due and reasonable facility in the interest of the public, and that the route proposed is a reasonable route, and this Court doth grant and allow the through rates and fares set forth in the said schedules and the said route accordingly, and as to the apportionment of the said through rates and fares, this Court doth, subject to the aforesaid minute filed in this Court ” [which stated that by agreement the apportionment should only apply in so far as such through rates and fares were divisible by mileage *via* the Forth Bridge and without prejudice to all or any statutory enactments, statutory or private or other agreements or arrangements, and the regulations of the railway clearing-house affecting the apportionment or division of such through rates and fares], “ apportion such rates and fares in the manner proposed by the applicants in their said notice of the 19th day of October, 1898, such apportionment to commence from the 10th day of March, 1899 ” [the date of the judgment].

The respondents appealed against this Order ; also the applicants, in so far as it determined that the apportionment should commence only from the 10th day of March, 1899.

Dean of Faculty (Asher, Q.C.) (Cooper with him), for the

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The applicants' notice of January 14th, 1890 (through the clearing-house) was a sufficient compliance with section 25 (1). The respondents' objection being only to proposed apportionment, the rates must be held to have had effect since the opening of the bridge and to be agreed-on rates under sub-section 7. Therefore, if the notice were valid, the Order of the Commissioners ought to take effect from the date of the opening of the bridge. If the notice were invalid, then the notice of the 19th October, 1898, was good. The Commissioners' Order should not be limited to the rates scheduled in the application, but should apply to all the rates then existing; they could determine this as a general principle. Sub-section 9 applies only to companies forced to compete with themselves, being owners of the whole length of the competing line; here the respondents only possess a link in the competing route.

Solicitor-General for Scotland (Dickson, Q.C.) (Ferguson with him), for the Great North of Scotland railway company.

The notice of the 14th January, 1890, contained none of the essentials: firstly, it was not stated to be under the Act; secondly, it set forth neither rates, nor route, nor apportionment; thirdly, it was not issued by an official of the applicants' company, but by the secretary of the clearing-house, it was not addressed to the respondent companies, but was merely an intimation to their goods managers that these matters would be discussed; the respondents never agreed to it. The notice of 19th October, 1898, was not valid, as it did not set forth what amount of each through rate fell to each company, it merely asked for apportionment on a certain basis, viz., a 19-mile bonus. Therefore the Commissioners had no jurisdiction. They certainly had no power to make the order retrospective.

Johnston, Q.C. (Macphail with him), for the Highland railway company.

The Commissioners in allowing the bonus mileage would be disregarding the provisions of sub-section 9, since the Highland railway company (who were owners of certain lines forming

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part of another route), would thereby be compelled to accept a less rate than they were entitled to charge for the traffic carried by them thereon.

Guthrie, Q.C., and *Nicolson*, appeared for the Caledonian railway company.

LORD TRAYNER: The present appeals are brought against a judgment and order pronounced by the Railway and Canal Commissioners on an application presented to them by the North British railway company and Forth Bridge company in November, 1898. That application is based upon the Railway and Canal Traffic Acts, and more particularly upon sections 25 and 26 of the Act of 1888, and craves the Commissioners to apportion certain through rates and fares over certain through routes, among the applicants on the one hand, and the companies called as respondents and all other companies interested in the said rates and fares, on the other hand. The rates and fares sought thus to be apportioned are set forth by the applicants in schedules appended to their application. The Railway Commissioners have granted the application, but have determined, contrary to the contention of the applicants, that the apportionment which they have sanctioned should have effect only as from the date of their judgment, and not as from the date when the Forth Bridge was opened. Against this limitation the applicants have appealed. The respondents who appeared to oppose the application have appealed against the judgment of the Commissioners on several grounds, but they may be summarised as being (1) that the Commissioners have no jurisdiction to determine the question submitted to them; and (2) that in the judgment they have pronounced they have disregarded the provisions of the Act under which the application was made.

1. In dealing with the first of these objections it is necessary to have regard to the provisions of the 25th section of the Act of 1888, which provides for the establishment of through traffic and through rates, where one company desires to have such traffic over the system or part of the system of another company.

The portions of that section which are of the most importance at present are these :—

- “(1) The company or person requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company, stating both its amount and the route by which the traffic is proposed to be forwarded; and when a company gives such notice, it shall also state the apportionment of the through rate. The proposed through rate may be per truck or per ton.

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- “(2) Each forwarding company shall, within ten days, or such longer period as the Commissioners may from time to time by general order prescribe, after the receipt of such notice, by written notice inform the company or persons requiring the traffic to be forwarded, whether they agree to the rate and route; and if they object to either, the grounds of the objection.

* * * * *

- “(5) If an objection be made to the granting of the rate or to the route, the Commissioners shall consider whether the granting of the rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly, or fix such other rate as may seem to the Commissioners just and reasonable.

* * * * *

- “(7) If the objection be only to the apportionment of the rate, the rate shall come into operation at the expiration of the prescribed period, but the decision of the Commissioners, as to its apportionment, shall be retrospective; in any other case the operation of the rate shall be suspended until the decision is given.”

The respondents say that unless and until the requirements of the first sub-section are complied with, the Commissioners have no power to approve of the proposed route, or to fix or apportion any rates in connection with it, and further, that the notice given by the applicants was not a sufficient notice, or

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such as the statute requires to be given. Now, I agree with the view that the Commissioners could not exercise the powers conferred on them by the 25th section of the Act unless what the statute prescribes as preliminary to such exercise has been observed. The question therefore is, whether the notice given by the applicants on 19th October, 1898, complied with and fulfilled the statutory requirements. I am of opinion, agreeing with the Commissioners, that it did. It sets forth (1) the proposed route *viâ* the Forth Bridge; (2) the proposed rates and fares—the rates and fares set forth in the annexed schedule being the rates and fares then in operation; and (3) the apportionment of the rates—by in every case allowing to the North British company such sum as they would be entitled to if the route by the Forth Bridge was 19 miles longer than it actually is. The respondents maintained that the notice was defective in respect it did not indicate whether the proposed apportionment was to proceed on the principle of division of rates according to mileage, and therefore did not indicate what proportion of the rates and fares would fall to them. I think there is nothing in that objection, but if on this subject the notice left any room for doubt (I do not think it did), that doubt was cleared away by the minute lodged by the applicants, to which the Commissioners in their order and judgment have given effect. The objection, therefore, to the jurisdiction of the Commissioners cannot be sustained.

2. The second ground on which the judgment of the Commissioners is objected to is, that they have disregarded (to the prejudice of the respondents) the 9th sub-section of the 25th section of the Act of 1888. On this subject I do not think it necessary to do more than say that I do not accept the respondents' reading of that sub-section, and that I entirely agree with the views expressed in regard to it by Sir Frederick Peel.

The objections I have hitherto dealt with were maintained on behalf of the whole respondents. But a special objection to the Commissioners' jurisdiction was stated on behalf of the Caledonian company, to the effect that under their amalgamation (with the Scottish North-Eastern railway) Act of 1866 questions as to rates between that company and the applicants were

referred to arbitration, and that therefore the present application, so far as these two companies are concerned, is incompetent, or at all events superfluous.

In a former application by the North British company, similar in purpose to the one now before us, I (being then *ex officio* Railway Commissioner for Scotland) repelled that objection for reasons which I then gave, and to which it is enough now to say that I adhere. The Commissioners in the present application have given no effect to the objection, and I think they were right. The objection seems to me untenable, and the scant reference to it in the opinions delivered, when the judgment under review was pronounced, does not surprise me.

I come now to consider the appeal maintained by the applicants, who complain that the judgment of the Commissioners is wrong, in so far as it limits the application of their Order to the apportionment of rates and fares from the date of their judgment, instead of allowing the same apportionment since the year 1890.

The applicants say that they gave what was, or was equivalent to, the statutory notice in writing on 14th January, 1890, by an intimation then made to all the respondents (and other companies interested) through the clearing-house. Now, I entirely agree with Lord Stormonth Darling in holding that that notice was quite insufficient, and that it cannot be taken as fulfilling the requirements of the 25th section of the Act. I need scarcely repeat what his Lordship has said about that notice, but will merely add, that as it announced only the probable opening of the Forth Bridge, it could not in the nature of things be regarded as a notice asking for the facility of through traffic and through rates on a route that was not then completed or opened, and which consequently might never be opened. Nor was the intimation of what the North British company intended to claim, if and when through traffic was established, anything to the purpose. In saying this I am not saying anything which is inconsistent with the opinion I delivered in the former application. In that opinion I stated my view of what was required by the provisions of the Act, and also said that I thought the notice before me then sufficiently complied

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with its requirements. But the notice I was dealing with was not the notice of 14th January, 1890. It was a notice sent to the companies interested through the clearing-house, dated in July, 1890, in which it was stated that the Forth Bridge had been opened, that the route by that bridge had been substituted for the former route to the North, and that the rates and fares by the old route were discontinued and applied to the Forth Bridge route. At the same meeting at which this announcement was made, reference was made to the claim of the North British railway company to a bonus or mileage allowance for 19 miles beyond the actual mileage of the route. Whether I was right or wrong in the view which I expressed is of no moment here, because the notice with which I was then dealing is not now before us, and was not produced in this application. We must take the present case as it was presented in argument and evidence to the Commissioners, and the only notices produced to them and founded on by the applicants were the notices of January, 1890, and October, 1898. The former of these notices was, in my opinion, as I have said, insufficient as wanting in the statutory requirements—the latter, I think, was sufficient.

In these circumstances, and having regard to the questions raised under this application and the attitude of the several parties to those questions, it remains to be considered whether, as the applicants contend, the Commissioners were entitled to make their apportionment retrospective. I think the statute is clear upon this matter. By sub-section 7 of the 25th section it is provided that the apportionment shall be retrospective only in those cases where no other question than apportionment is raised; that is, the apportionment of rates agreed on or not objected to. But in the present case the rates were not agreed-on rates. They had no doubt been acted on for some years, but they might have been objected to at any time. There had been no agreement as to their being fixed at what they were, or as to their continuance. The Commissioners had accordingly to fix and allow the rates, and apportion what they had so allowed. That being so, the Commissioners could not make their apportionment retrospective, but could make it applicable, as they have done, only from the date of their decision.

It is scarcely necessary to say anything upon the question raised by the applicants as to their right to the bonus mileage claimed by them as a right conferred on them by the Forth Bridge Acts of 1873 and 1878. Whatever may be the sound construction and the effect of that Act in regard to the bonus mileage (on which I reserve my opinion) it has no bearing on the present application. This application is not for the enforcement of a right conferred by those Acts; it is an appeal to the discretion of the Commissioners founded on the 26th section of the Act of 1888, and as such it has been regarded and determined by the Commissioners.

I have hitherto dealt only with the application of the North British Railway and Forth Bridge railway. But my observations apply equally to the application which concerns the Tay Bridge.

On the whole matter, I think the judgment and order of the Commissioners is right, and that the several appeals presented against it should be dismissed.

LORD MONCREIFF: I am of the same opinion. The only competent notice before the Commissioners was that of 19th October, 1898. The notice of 14th January, 1890, which was given through the clearing-house, is in no view sufficient notice to satisfy the terms of section 25 of the Railway and Canal Traffic Act of 1888. It specifies no rates or routes, and this alone is enough for our decision. But I reserve my opinion as to whether such an agenda-paper could in any circumstances fulfil the requirements of the statute as to notice. On that point it is not necessary that I should express any opinion at present.

With these remarks I entirely concur in the opinion of Lord Trayner, which I have had an opportunity of considering.

LORD JUSTICE-CLERK and LORD YOUNG concurred.

[Solicitors for the Forth Bridge and North British railway companies: *Miller, Robson, and M'Lean*, W.S., and *James Watson*, S.S.C.]

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	Solicitors for the Caledonian railway company: <i>Hope, Todd, and Kirk, W.S.]</i>

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Certain through rates for traffic passing *viâ* Strabane, between the railway of the Great Northern company and the railway of the Donegal company west of Strabane, were in operation under a notice duly served on the Donegal company in accordance with the provision of section 25 of the Railway and Canal Traffic Act, 1888. Each of the railway companies owned a railway between Strabane and Londonderry, and were competing for the traffic.

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Upon a complaint by the Great Northern company—(1) of the unreasonable delay caused by the Donegal company to traffic forwarded from Londonderry *viâ* Strabane, partly on the line of the Great Northern company and partly on the line of the Donegal company, and *vice versâ*; (2) of improper diversion of traffic from the line of the Great Northern company to the line of the Donegal company, and obstruction offered at stations on the Donegal company's line west of Strabane to the use by the public of the route to Derry by the line of the Great Northern company as a through route; (3) of improper refusal of the Donegal company to recognise the through bookings of passengers by the Great Northern company from Londonderry *viâ* Strabane to stations on the Donegal company's line west of Strabane; (4) of detention of the Great Northern company's wagons at Strabane owing to the delays in transshipment of traffic by the Donegal company.

Held, that the Great Northern company were entitled on the facts proved to an order enjoining the Donegal company to afford all due and reasonable facilities for carrying out the through system of booking and rates over the Great Northern company's and Donegal company's railways for passengers and goods as required by the notice served by the Great Northern company on the Donegal company, and in particular for transferring to and from the Great Northern company's railway all goods and traffic carried at through rates partly over the railway of the Donegal company and partly over the railway of the Great Northern company.

(1) Before GIBSON, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Four Courts, Dublin.

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The Donegal company applied for an order declaring that the through rates in force under the notices served on the Donegal company by the Great Northern company were not a reasonable facility or required in the interests of the public, and that the same should no longer be in force.

Held, that no case had been made for rescinding the through rates.

Query, whether the Court has power to rescind through rates, which have become valid by a notice under section 25 of the Railway and Canal Traffic Act, 1888.

Upon complaint that the Great Northern company granted a rebate of 1s. per ton out of their portion of the through rates it was proved that the Great Northern company were not acting *mala fide* nor for the purpose of treating the Donegal company unfairly, but to secure a portion of the competitive traffic, and that without such rebate the Great Northern company would lose the traffic altogether owing to the delays caused by the Donegal company at Strabane.

Held, that no case had been made for prohibiting the Great Northern company from allowing the rebate.

THIS was an application by the Great Northern railway company of Ireland under section 2 of the Railway and Canal Traffic Act, 1854. They were the owners of a line of standard gauge, running from Londonderry to Strabane, and thence southward to Enniskillen and Dublin, with several branches. The Donegal railway company owned or worked a narrow gauge line running from Strabane westward to Stranorlar, and thence in two branches to Glenties and Killybeg (*viâ* Donegal). In 1896 the Donegal company had obtained Parliamentary powers, and had constructed an extension of their line (narrow gauge) to Londonderry, with a terminus on the opposite side of the river to the Great Northern company's terminus. Each company had therefore a line from Strabane to Londonderry. The stations of the two companies at Strabane were adjacent, with a connecting footbridge for passengers. The transhipment of goods there was performed in a shed, containing a platform, on either side of which ran lines connected with the two systems; the shed, platform, and both sets of lines being the property and constructed entirely on the land of the Donegal railway company.

The Great Northern railway company in their application stated that through rates and through booking between the two companies' systems *viâ* Strabane had formerly existed, and that the transhipment of traffic had been satisfactorily carried out; but that prior to the opening of their new line from Strabane

to Londonderry, the Donegal company gave notice of the discontinuance of the aforesaid through rates and through booking. Therefore the applicants served a written notice proposing through rates and routes under the terms of section 25 of the Railway and Canal Traffic Act, 1888, upon the Donegal company; and no objection having been taken thereto by the Donegal company, at the expiration of ten days from the service of the said notice, the prescribed rates and routes had admittedly come into operation.

They complained that, notwithstanding such through rates having come into operation, the Donegal company had not afforded reasonable facilities for their traffic at Strabane, by not issuing or accepting through tickets, and by unreasonably delaying the transshipment of through goods traffic at Strabane.

The applicants, the Great Northern railway company, asked for—

(1) An order enjoining the Donegal company to afford all reasonable and proper facilities for carrying out a through system of booking and rates over the applicants' and Donegal company's railways for passengers and goods, and in particular for transferring to the applicants' line from the Donegal company's, and *vice versa*, all goods and traffic to be carried at through rates partly over the line of the Donegal company and partly over the line of the applicants;

(2) An order declaring the applicants entitled to do all work of transshipment at Strabane of all goods and traffic to be carried between stations on the two companies' lines *vid* Strabane, such transshipment to be at the applicants' cost, they paying a just and equitable rent for the use of the premises; or, alternatively, that the Donegal company be ordered to exercise all due diligence and despatch in receiving, transshipping, and forwarding at Strabane such through traffic as aforesaid;

(3) An order enjoining the Donegal company to desist from unduly preferring their own line; and

(4) For damages for unreasonable delay and improper diversion of traffic, and the loss resulting therefrom.

The Donegal company, in their answer, attributed the constant delays in the transshipment of traffic at Strabane to the applicants'

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failure in supplying wagons. They said that the fact of transshipment being necessary at Strabane rendered the route between stations on their line west of Strabane, and Londonderry, by way of the applicants' line, totally unsuitable and inconvenient as compared with the Donegal company's continuous line, and that through rates were not due and reasonable facilities required in the interests of the public, and that unexpected applications for an unusual number of wagons for such variable traffic seriously deranged the Donegal company's traffic. They denied that they had discontinued through booking, or refused to accept through tickets.

With regard to the transshipment shed, they submitted that the Court had no jurisdiction to order them to lease the same to the applicants, or to grant them a licence to enter the same; and they denied that such lease or licence would be a reasonable facility, or would benefit the public.

The Donegal company filed a cross-application, by which they sought that the through rates between Londonderry on the Great Northern line and stations west of Strabane on their own line, which had come into force by the notice under section 25 of the Railway and Canal Traffic Act, 1888, should be declared not to be a reasonable facility, and should be no longer in force; or, in the event of the Court determining that the said through rates were a reasonable facility required in the interests of the public, then, that the Court should allow the through rates which the Donegal company had previously proposed by written notice between their line and the Great Northern stations to the south of Strabane. They also asked for an order restraining the Great Northern company from granting any undue preference to themselves or other persons, by giving rebates or other advantages to merchants and traders consigning traffic to, from, or *via* Londonderry from or to places west of Strabane, *via* the Great Northern line, to the prejudice of the Donegal company, and merchants and traders sending such traffic by their route.

The Great Northern railway company put in an answer to this cross-application, in which they stated, *inter alia*, that their station at Londonderry was more conveniently situated than the

new station of the applicants' extension, and that this, combined with a more rapid service, would make it of advantage to the public to use either route on equal terms.

Gordon, K.C., Campbell, K.C., and Chambers appeared for the Great Northern railway company.

The Macdermot, K.C., Matheson, K.C. (Macrory with them), for the Donegal railway company.

The railway company's special Act authorised the extension to Londonderry expressly to avoid transhipment at Strabane. A ruinous competition is not in the public interest: *Great Western Railway Company v. Wye and Severn Bridge Railway Company* ⁽¹⁾. The ground for section 25 of the Railway and Canal Traffic Act, 1888, giving power to establish through rates, is that they are a reasonable facility required in the interests of the public. The Court is the sole judge of "reasonable facilities." A "reasonable facility" may cease to be so, by change of circumstances; the Court would then have power to discontinue the through rate: *Belfast Central Railway Company v. Great Northern Railway Company (Ireland)* ⁽²⁾. A through rate is one entire sum, which the companies concerned agree to charge the public, and there is an implied contract that each company will charge the agreed sum.

The judgment of the Court was delivered by Mr. Justice Gibson:—

GIBSON, J.: This case has been very fully discussed. It purely depends upon matters of fact; but I do not think much would be gained by attempting to analyse the evidence in detail.

The first ground of complaint put forward by the Great Northern company is, in substance, that there have been unjustifiable and intentional delays in transferring goods from the Great Northern line at Strabane into the defendants' trucks. In our opinion, the evidence given on behalf of the applicants entirely establishes that the delays, which, of course, are to a certain extent necessary upon transhipment, have, since the

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⁽¹⁾ *Ante*, Vol. V. 193.

⁽²⁾ *Ante*, Vol. IV. 159.

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construction of the Derry extension, been increased in a most astonishing way. Constant complaints were made by the traffic superintendent of the Great Northern railway, with details of particular instances, and those complaints were renewed week after week, but never attended to. The delays were of such a character, and so often repeated, that it is impossible to escape the conclusion that they were, to some extent, the result of design. If there had only been a few cases of casual delay, now and again, it would perhaps not be necessary for the Court to take action; but they have been so constantly repeated that it is impossible to avoid the conclusion that they are part of a mistaken policy of some officers of the Donegal company. The result of it has been that the traffic of the Great Northern company in that district has been very nearly killed; and that must be set right; and we shall therefore order that the respondents be enjoined to afford all reasonable facilities to the applicants' line, and *vice versa*, of the traffic, without any unreasonable delay.

The second head of the application is for an order declaring the applicants, the Great Northern company, entitled to do the transshipment at Strabane themselves. We cannot accede to that request.

Next, the Great Northern company ask us to make an order enjoining the respondents, the Donegal company, to desist from taking any undue preference to themselves in the carrying for themselves or other persons of goods and traffic, or in their charges for the same over the applicants', and enjoining the respondents not to subject the applicants to any undue prejudice in respect thereof. We do not propose to make an order in affirmance of that application, which would have a much wider effect, perhaps, than we would be prepared to go. But the evidence shows that there have been cases in which persons who were desirous of sending goods, and passengers who desired to go, by the Great Northern line, have applied to officers of the Donegal railway, and have been practically unable to do it. We shall therefore make an order restraining such action on the part of the Donegal company.

Then there is a claim by the Great Northern company for damages. No case for damages has, in our opinion, been made;

but the Great Northern company having succeeded, substantially, in their application, we see no reason for departing from the rule that they should get the costs of the proceedings.

Now comes the cross-application on behalf of the Donegal company. They ask that the through rates, which came into force automatically in August last, should be rescinded, and declared null and void.

The jurisdiction the Court may have, in the exercise of its statutory powers, to rescind a through rate which has once become valid under the statute, is by no means clear. I would not like myself to lay down, that in a particular state of facts, or under certain circumstances, it might not be competent for us to replace a through rate by a new rate, when the circumstances which existed when the rate was fixed were altogether altered. But there is a much greater difficulty when the application is, not to replace a rate by a new rate, but to rescind a rate without putting anything in its place, the object of the Donegal company being frankly admitted to be to get rid of the Great Northern competition, which might result in their being exterminated in a war of rates. I think it better on this occasion not to express any opinion on the question of jurisdiction; but my colleagues inform me that, from the establishment of the Commission, there has never been any attempt to exercise such a jurisdiction. It is a question that we do not deem it necessary to decide on this occasion, as we all agree that no case has been made for rescinding the through rates. It is quite right, as far as I can see, that there should be a through rate, to facilitate the public, and to supply a certain element of competition; and it would be an unreasonable thing that the Great Northern company should be shut out altogether merely because there is a new line between the city of Derry and Donegal.

Now comes a question which has been discussed at some length, as to the rebate granted by the Great Northern company of a shilling a ton, out of the through rate. These rebates date, as far as the evidence shows, from about the 1st of September, though not many of them were made, apparently, until October, but since then these rebates have apparently been constantly made. The case put forward, on behalf of the Great Northern

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company, is that but for these rebates they would be unable to win any part of the traffic, by reason of the delays at Strabane ; and it appears that after all they have only been able to capture about 700 tons of traffic, as compared with 11,450 tons carried by the Donegal company.

There are several questions to be considered before this Court could act with regard to this matter. Firstly, is it illegal for the Great Northern company to make rebates out of their own share of the through rates ? Suppose there was no competing line—in other words, suppose the Donegal extension had not been carried out, would there be anything illegal in the Great Northern company making a present out of their share of the traffic rates to their customers, so long as they did not give any preference to one customer over another ? I would feel great difficulty in saying that such action on the part of the Great Northern company would be illegal. The only way in which I can discover that they would be acting illegally in giving the rebate would be, by considering that it is to the disadvantage of the Donegal line, considered as a whole, in connection with the extension. In other words, the damage is not to the partners in the through route, but the damage is to a competing company. Mr. Matheson rested his case on the contention that, when a through rate has been established, there is an implied contract that each company will exact from the public the entire amount of such through rate, so as to preserve an equity between the competing companies. Whether he is right in that, in the sense that he could enforce the performance of such a contract, is a doubtful proposition. As far as I can see, the action of the Great Northern company, in giving the rebate, was not *mala fides*, nor for the purpose of treating the Donegal company unfairly, but to save this portion of their traffic from annihilation. To save themselves from the consequence of the delays, they were practically buying the traffic at a loss. On the other hand, Mr. Campbell called attention to a piece of strategy on the part of the Donegal company, which, though no doubt not illegal, was scarcely above board. That was, that when the Great Northern company went to the Donegal company, to take copies of their rates, for the purpose of their through rate notice, they

were shown the old rates on the Donegal line, and that the Donegal rates were revised and changed on the same day; and that ten days later, when an officer of the Great Northern company called on the Donegal company, for the purpose of revising and checking the list of through rates, he was given a list of the old rates, which had ten days previously been abrogated and reduced. That was, in my opinion, an act of strategy on the part of the officers of the Donegal company, which was certainly not a straightforward proceeding, although not absolutely illegal. As far as we are able to form an opinion, no case has been made to our satisfaction for inhibiting or enjoining the Great Northern company from the action they have taken with respect to these rebates. But, speaking for myself, I am of opinion that, as soon as the delays on the part of the Donegal company have been discontinued, and when there shall be no longer any obstruction of that kind given to the Great Northern traffic, the Great Northern company ought not lightly to depart from the through rates which they themselves have fixed. Of course nothing they can do can affect the right of the Donegal company to the full share of the through rates to which they are entitled under the through rate notice.

Another matter is the charge to be made on the Great Northern company, in favour of the Donegal company, for the use of the facilities at Strabane. As I understand, the companies are willing that that should either be settled between them, or by arbitration, and we will put a clause to that effect in our order.

As regards the through rates which the Donegal company have proposed, as the Great Northern company have consented to grant through rates, we will, by consent, make an order to that effect, and let the amount of such through rate, and its distribution, be arranged between them, and if the parties cannot agree, we will settle it; but I trust the parties will settle the matter between themselves without coming to this Court again. The parties will bear their own costs of this application.

A clause was put into the order that the Great Northern company agreed to pay whatever sum might be agreed on between them and the Donegal company, or, in the event of

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DONEGAL RY. CO. v.	[Solicitors for the Great Northern of Ireland railway company : <i>Crawford and Lockhart</i> .
GREAT NORTHERN RY. CO. (IRELAND).	Solicitor for the Donegal railway company : <i>R. A. Macrory</i> .]

LONDON AND INDIA DOCKS COMPANY

r.

GREAT EASTERN RAILWAY COMPANY AND

MIDLAND RAILWAY COMPANY⁽¹⁾.

*Through Rates—Dock Company—Lines within Area of the Dock Estate—
“ Railway Company ”—Railway and Canal Traffic Act, 1888 (51 & 52 Vict.
c. 25), s. 25—Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 3.*

The Regulation of Railways Act, 1873, defines the term “ railway company ” as including “ any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament,” and the term “ railway ” as including “ every station, siding, wharf or dock of or belonging to such railway and used for the purposes of public traffic.”

*May 18.
December 13.
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February 13,
14.
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Section 25 of the Railway and Canal Traffic Act, 1888, after making provisions for through traffic, enacts that “ the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company at the request of any other such company of through traffic to or from the railway or canal of any other such company at through rates, tolls, or fares.”

Upon an application under this section by a dock company for through rates it was proved that such company owned and worked with their own engines under Parliamentary authority lines of railway on their dock property, and had (also under Parliamentary authority) constructed and set aside for the use of a railway company large sidings situated at a distance of 29 chains within the dock boundary, to which sidings the railway company conveyed traffic to be exchanged with the dock company. A portion of a public railway had been transferred to the dock company, but this railway was not a part of the through route in respect of which the application was made. There was no statutory regulation of tolls or rates chargeable by the dock company, except for dock services, and the Railways Clauses Consolidation Act, 1845, was not incorporated in their special Acts.

Held, by WRIGHT, J., and LORD COBHAM (SIR FREDERICK PEEL dissenting) that the dock company owning and working under Parliamentary authority railways which were part of one continuous route from another railway company's system to the exchange sidings, were a “ railway company ” who could propose through rates to that other company under section 25 of the Railway and Canal Traffic Act, 1888.

Held by the Court of Appeal (reversing the decision of a majority of the

(¹) Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

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Railway Commissioners) that the dock company were not a "railway company" competent to propose through rates within the meaning of the Railway and Canal Traffic Act, 1888, the railways (including the transferred line) being merely ancillary to their dock undertaking, and not part of a continuous line of railway communication from a place on one railway to a place on another railway.

THIS was an application by the London and India Docks Company under section 25 of the Railway and Canal Traffic Act, 1888, for an order allowing through rates in respect of traffic from the quays and warehouses of the applicants in the Royal Victoria and Albert Docks. Such traffic was conveyed over lines of rails to certain stations on the Midland railway by a route which passed over certain portions of the Great Eastern railway company's lines. The applicants proposed certain through rates to be apportioned between themselves, the Great Eastern railway company, and the Midland railway company. The applicants were the owners of certain docks in the port of London, and in particular controlled and managed the Royal Victoria and Albert Docks. These docks had been constructed under various Acts of Parliament, the most important of which (for the purposes of this application) were the London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. 128), and the London and St. Katharine Docks Company Act, 1875 (38 & 39 Vict. c. 153). Under the powers contained in these Acts the applicants had constructed lines of railway to the various warehouses and quays, forming a junction with the lines of the Great Eastern railway company. In particular they had constructed a group of sidings known as the Exchange Sidings, commencing at a distance of 29 chains from the junction with the Great Eastern railway. These sidings were authorised to be constructed as being "necessary and convenient for the marshalling, reception, delivery, standing and accommodation of trains, carriages, wagons, and engines used for the purposes of dock traffic passing or intended to pass to or from the Victoria Dock extension from or to the North Woolwich branch, so as to render unnecessary the shunting or stopping of such trains, carriages, wagons, or engines on the North Woolwich branch.

Section 146 of the London and St. Katharine Docks Act, 1864, enacts that: "It shall be lawful for the company on

the one hand, and the Great Eastern railway company, the London and North-Western railway company, the North London railway company, the Great Northern railway company, the Midland railway company, and the Great Western railway company, or either of them, on the other hand, to enter into agreements with respect to the rates and charges to be levied by the company upon railway traffic using the said docks, and as to the making of any through rates and charges, and the division and apportionment thereof, and as to the facilities to be afforded to such traffic to and at such docks, and as to the use by the said railway companies of the railways, tramways, jetties, and other conveniences at the said docks."

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Section 147 enacts that: "It shall be lawful for the Great Eastern railway company, and the London and North-Western railway company, the North London railway company, the Great Northern railway company, the Midland railway company, and the Great Western railway company respectively, with their carriages, wagons, and servants, to use free of charge, the railways, tramways, and other conveniences at the London Dock and the Victoria Dock, so as to enable them to convey goods and other traffic to and from the shipping there, subject only to such reasonable rules and regulations as the company may find it necessary in the public interest to make; and the company shall provide space at the Victoria Dock for the erection of offices by the London and North-Western railway company, the North London railway company, the Great Northern railway company, the Midland railway company, and the Great Western railway company, for clerks and for storage of sheets, ropes, and other necessary articles required by the said railway companies, or either of them, for the conduct of the business."

By section 6, sub-section (f) of the London and St. Katharine Docks Company Act, 1875, a certain portion of the North Woolwich branch of the Great Eastern railway, and the site of the transferred portion of the North Woolwich branch and the land and works connected therewith, were vested in the dock company, but all other lands then forming part of the North Woolwich branch were vested in the Great Eastern company.

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By sub-section (g): "The transferred portion of the North Woolwich branch shall for ever after the vesting thereof in the company (but subject to the provisions of the following paragraphs of this section) be maintained by the company to the reasonable satisfaction of the Great Eastern company in good and efficient repair and working order, so as to admit of the user thereof as hereinafter provided for traffic by the Great Eastern company, and by all other companies lawfully entitled to the user of the substituted line, and also at all times for the goods traffic to and from the docks, but so nevertheless that the requisite alterations of the line, levels, gradients, and curves shall be made to carry the transferred portion of the North Woolwich branch over the swing bridge hereinafter provided for. In the user of the said line the passenger traffic of the Great Eastern company shall at all times have priority, and subject thereto any difference as to the user of the said line shall be determined by an arbitrator to be appointed on the application of any company interested by the Board of Trade."

By sub-section (k): "The company shall either set apart such sidings, or shall allow the Great Eastern company upon the company's Victoria Dock estate to lay down, free of charge, and maintain such sidings as may be necessary and convenient for the marshalling, reception, delivery, standing and accommodation of trains, carriages, wagons and engines used for purposes of dock traffic passing or intended to pass to or from the Victoria Dock extension from or to the North Woolwich branch, so as to render unnecessary the shunting or stopping of such trains, carriages, wagons, or engines on the North Woolwich branch; and the company shall permit any such sidings, whether set apart by them or laid down by the Great Eastern company, to be fully and freely worked and used by the last-mentioned company for dock traffic. Any difference between the two companies as to any matter arising under this paragraph shall be determined by arbitration in manner herein provided, and the arbitrator may prescribe the extent of and works in connection with the sidings to be provided by the company, and may settle all points in difference between the companies in reference thereto."

The applicants conveyed traffic by means of their own engines and servants from all parts of the Victoria and Albert Docks to the Exchange Sidings, and there placed the trucks containing it in train order on lines appropriated for the time to the traffic of the defendants and other railway companies respectively conveying traffic from the docks.

Under an agreement made on April 18th, 1864, the applicants performed the service of loading the traffic above referred to, and the further services above-mentioned, for the all-round sum of 1s. 5d. per ton, and the applicants proposed in the application that the terms of the said agreement should be made applicable to the through rates proposed. There was a large volume of traffic landed *ex ship* on to the quays of the Royal Victoria and Albert Docks, and despatched thence, either direct or after warehousing in the applicants' warehouses, to stations on the Midland railway. The defendants refused to quote through rates to be charged upon such traffic.

It was claimed by the applicants to be in the interest of the public that freighters should not be required to pay the rates published in the rate-books of the Midland company at their Victoria Dock station, including a charge for the service of cartage in London when no such service and no equivalent for such service was actually performed; and that through rates omitting charges for such services not rendered should be quoted for the traffic in question.

By their answers the Great Eastern railway company and the Midland railway company respectively alleged, *inter alia*, that the applicants were not a railway company, and that their lines to which the application referred were not a railway within the meaning of the Railway and Canal Traffic Act, 1888.

Balfour Browne, K.C., Freeman, K.C., and Waghorn, for the applicants.

The applicants are a "railway company" within the meaning of the Regulation of Railways Act, 1873, and are entitled to apply to the Court for an order allowing the proposed through rates and apportionment. The dock railways were constructed

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under Acts of Parliament which recognised that they are to be worked in connection with the railways of other companies as part of a continuous route.

Cripps, K.C., Asquith, K.C., and Ernest Moon, for the defendants.

The applicants are not a railway company in connection with the lines over which these through rates are sought to be made: *East and West India Dock Company v. Shaw Savill and Albion Company* ⁽¹⁾. The decision of the Court of Appeal in *Williams v. London and North-Western Railway Company* ⁽²⁾ is in favour of the railway company, the dock lines being in the same category with the lines which were held in that case not to constitute a "railway."

WRIGHT, J.: This is an application by the London and India Docks company against the Great Eastern railway company and the Midland railway company for through rates, and it alleges that the docks have been constructed under powers of Acts of Parliament; that under those Acts the applicants or their predecessors in title have constructed lines of railway forming a junction with a railway of the Great Eastern company, and extending for a distance of three miles on either side of the docks to various warehouses and quays, and in particular that they have constructed the exchange sidings commencing about 29 chains on the dock side from the junction with the Great Eastern railway.

Then they quote the provision of the Act under which those sidings were constructed, and state that they, the dock company, convey traffic, by means of their own engines and servants, from all parts of the dock to the exchange sidings, and there place the trucks containing the traffic in train order on lines appropriated for the time to the traffic of the defendants, and of other railway companies conveying traffic from the docks. The total length of the lines of railway within the dock property, for the purpose of bringing railway traffic to and from the Great Eastern railway

⁽¹⁾ (1888) 39 Ch. D. 524; 57 L. J. Ch. 1038.

⁽²⁾ (1900) 1 Q. B. 760; 69 L. J. Q. B. 581.

is about 45 miles. Then the applicants refer to an agreement of 1864, and then state the facts, and claim an order allowing a through rate with a particular apportionment.

To-day we have not to deal with any question of the merits. We have merely to deal with the question of jurisdiction, and that is, put shortly, whether the dock company are for this purpose in the position of a railway company owning and working a railway. There is no doubt or question whatever but that for some purposes the dock company are a railway company. They have a very extensive system of railways on their dock estate. They are a railway company unquestionably for some purposes, and for some purposes of the Railway and Canal Traffic Acts. Under an Act of 1882 they own and work a passenger line, in all respects under the same conditions under which ordinary passenger lines are owned and worked. They have been held ⁽¹⁾ to be a railway company under the Railway Companies Act, 1867, and the decision holding them to be a railway company has been recognised by Parliament in the Act which provided for the amalgamation of the dock companies, which enacted that the amalgamation should not deprive them of their status under that Act.

But the question is whether for this particular purpose of through rates they are in the position of a railway company within the meaning of section 25 of the Railway and Canal Traffic Act, 1888. That section provides that every railway company owning or working railways which form part of a continuous line of railway or railway communication (I leave out about canals) shall afford all due and reasonable facilities, and so forth, and it goes on to enact that one of these facilities shall be the due and reasonable receiving, forwarding, and delivering by every railway company at the request of every other such company of all through traffic to and from the railway of any other such company at through rates, tolls or fares, and also the due and reasonable receiving, forwarding and delivering by every railway company at the request of any person interested in through traffic, of such traffic at through rates.

Now, in determining whether the dock company are within

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(1) *Ante*, Vol. VI. 96; 38 Ch. D. 576.

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that enactment, there are many things to be considered. There are two categories under either of which the dock company might be supposed to come. First of all, there may be a dock system in which there are laid down, in the docks, railways which may be called simply dock railways—domestic railways for the purposes of the dock traffic within the docks, constructed under general powers to do what is necessary for the work of the docks, and merely, as it were, by chance, connected at the dock gates with some external railway. But in a case like that it may be that there would be some purposes under the Railway and Canal Traffic Acts, with regard to which we should have jurisdiction over them as railway companies, but hardly, I think, in relation to the 25th section of the Traffic Act of 1888 as regards through tolls and rates. It is not necessary to express any opinion whether we should have jurisdiction in a case of that kind. In the other category would fall a dock company whose property includes railways or portions of railways forming in fact a continuation of general railway systems outside the dock estate connecting the dock railways with those railways as part of one continuous system, and appropriated for that purpose by the statute.

It is within that latter category that, as it seems to me, the dock company comes. First of all, by the London and St. Katharine Docks Act, 1864, s. 146, it was provided that it might be lawful for the dock company and a railway company to enter into agreements with respect to the rates and charges to be levied by the dock company upon railway traffic using the docks, and as to the making of through rates and charges, and the division and apportionment thereof, and as to the facilities to be afforded. If that section stood alone it would probably not be enough to make the dock railway a continuation of the railways outside. Then comes section 147, which says: "It shall be lawful for the Great Eastern" and other railway companies there specified, "with their carriages, wagons and servants, to use free of charge the railways, tramways and other conveniences at the London Dock and the Victoria Dock, so as to enable them to convey goods and other traffic to and from shipping there, subject only to such reasonable rules and

regulations as the company may find it necessary in the public interest to make"; and the dock company shall provide space for offices for the company, and for storage and so forth. Now, if that were the whole of the matter, I should be very much inclined to think it brought the dock company's railways within the scope of the Traffic Act of 1888, because it gives an absolute right for the railway companies named to use these dock railways as a continuation of their own system, subject only to reasonable rules and regulations in the public interest.

The matter does not rest there, nor does it rest merely on those two sections coupled with the agreement which was made during the passing of the Act of 1864, by which a right was given to the railway companies to exercise their powers on the terms mentioned in the agreement. It does not rest there, because there comes next the London and St. Katharine Docks Act, 1875. By section 6, sub-section (f) of that Act, the company are constituted proprietors of a branch called the North Woolwich branch, and in relation to that branch it seems to me they would unquestionably be a railway company for all the purposes of any traffic which passed from outside systems over that branch; but I do not understand that that is the case in this instance. Then in the same section there is sub-section (k), which provides, leaving out the immaterial words, that "the dock company shall set apart such sidings"—there is an alternative given which has not been adopted—"as may be necessary and convenient for the marshalling, reception, delivery, standing and accommodation of trains, carriages, wagons and engines, used for the purposes of dock traffic passing or intended to pass to or from the Victoria Dock extension from or to the North Woolwich branch so as to render unnecessary the shunting or stopping of such trains, carriages, wagons or engines on the North Woolwich branch; and the company shall permit any such sidings, whether set apart by them or laid down by the Great Eastern company, to be fully and freely worked and used by the last-mentioned company, for dock traffic." Now, it seems to me that the proper conclusion is, that under these various powers and regulations the dock company's railways, which are worked in the ordinary manner with locomotives and so forth as if they were ordinary railways,

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and are worked under powers, not optional, but compulsory, on the dock company, in connection with the system of the Great Eastern railway company, must be regarded as railways within the scope of section 25 of the Traffic Act of 1888. I do not see what element is wanting. They are unquestionably railways. The railways are owned and worked by the dock company; they are so owned and worked under Parliamentary authority, and are part of one continuous route from the system of the Great Eastern railway company to the quay sides. At any rate, they are part of the continuous route from the system of the Great Eastern company to a long way within the dock boundary, namely, the exchange sidings—a distance of 29 chains; that part seems to me to be unquestionably part of one continuous system of railway communication. I do not think it is necessary to say whether the rest of the dock railways, reached from the Great Eastern system *vid* the exchange sidings, are in the same sense part of the continuation of the general railway system or not; but at any rate, as regards that portion of the exchange sidings it seems to me that the section is applicable, and that is enough to make the dock company interested in a portion of the route, which route consists of the Great Eastern system and of this portion of the exchange siding in combination. It is said that there are no statutory tolls. That is quite true. There are no statutory tolls or rates chargeable by the dock company for the use of this railway, although there is a statutory regulation of the maximum tolls and rates which they can charge for all dock services; but the Railway and Canal Traffic Acts do not provide, either in the definition of a railway company or elsewhere, that the existence of a statutory regulation of tolls or rates shall be essential as a condition for the application of the Act.

Then it is said no returns are made to the Board of Trade, and no provisional order was issued by the Board of Trade or passed by Parliament in relation to the dock company. There may have been reasons for that, or it may have been a slip on the part of the Board of Trade. That cannot govern the construction of the section. For these reasons I am of opinion that the dock company are a railway company not merely for some purposes

but for this particular purpose, and that the application is well founded in that respect.

SIR FREDERICK PEEL: This is an application to us to order through rates proposed to the Midland and the Great Eastern railway companies by the London and India Dock company for traffic from the Victoria and Albert Dock *via* the dock company's lines of railway to stations on the Midland railway. The question is whether these dock lines are a railway within the meaning of section 25 of the Traffic Act of 1888, which describes the traffic a railway company may be required to forward at through rates as traffic arriving by the railway of another railway company.

Now, a railway for this purpose must be one constructed or carried on under the powers of an Act of Parliament, and I am inclined to think that the dock company's portion of the through route is not a railway of that sort. The three Dock Acts of 1853, 1864 and 1875 are the material we have for judging of this. The Act of 1853 required the dock company to permit the Eastern Counties railway company to lay down railways at the intended Victoria Dock, but gave the dock company itself power only to make tramways in connection with the dock; and the Act of 1864, which transferred the Victoria Dock estate to the London and St. Katharine Docks company, while it authorised the Great Eastern, the Midland and other railway companies to use the railways, tramways and conveniences at the London Dock and the Victoria Dock, left the powers of the dock company for constructing or carrying on railways as they stood under previous Acts. Then under the provisions of the Act of 1875 for the extension of the Victoria Dock, the dock company are either to set aside for the use of the Great Eastern company, or to allow that company to lay down upon the Victoria Dock estate, such sidings as may be necessary for the accommodation of trains with traffic passing between the Victoria Dock extension and the Great Eastern railway company's North Woolwich branch, so as to dispense with any shunting of the trains on that branch. In the execution of this Act the dock company appear to have constructed on their

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dock estate large sidings for the exchange of traffic, having a junction at one end with the North Woolwich branch and connecting at the other end with the docks. By agreement with the Great Eastern and other railway companies they work the dock railway traffic over these lines to and from the exchange sidings, to which the railway companies come to receive and forward or deliver it, as the case may be. The sidings and lines so made by the dock company are their portion of the proposed through route, and the question is, I think, does the direction to set apart sidings for dock railway traffic make the sidings so set apart a railway, and the company providing or owning them, a railway company? It seems to me that it does not, because the sidings which the dock company are directed to set apart refer, I think, to the sidings which by section 4 of the Act they are authorised to make in connection with the Victoria Dock extension; and unless these sidings are a railway, I do not think the setting them apart for Great Eastern railway traffic would make them such. The various works, however, authorised by section 4 are evidently allowed as works incidental to and an integral part of the dock undertaking, and the company's position in relation to them is that of a dock company only. In other respects the applicants have none of the grounds for being regarded as a railway company, which in the case of the *Manchester Ship Canal* ⁽¹⁾ led us to regard that company as a railway company competent to propose through rates to and from their docks; and on the whole I think the through rates as proposed by the applicants cannot be granted.

LORD COBHAM: So far as I have been able to form an opinion on the difficult points of law and construction which are involved in this case, my conclusion is in accord with that of the learned Judge, and I shall not attempt to add anything to what he has said.

The Midland railway company appealed.

⁽¹⁾ *Ante*, Vol. X. 54.

Ernest Moon (C. A. Cripps, K.C., and Asquith, K.C., with him), for the appellants.

There is no definition of a "railway" in the Regulation of Railways Act, 1873; what is meant by a "railway" in that Act is a railway over which traffic passes subject to the ordinary law which affects railways, such as, to the Railways Clauses Consolidation Act, 1845, or to section 24 of the Railway and Canal Traffic Act, 1888 (as to submitting a revised classification of merchandise traffic to the Board of Trade); neither of which has affected the applicants. The sidings are not sidings "of or belonging to the railway," but are of or belonging to the dock. The applicants are in precisely the same position with regard to the piece of Parliamentary line which has been transferred to them as to the rest of their lines, since they have no power to charge on it conferred on them, nor are they subject to the ordinary Parliamentary obligations with regard to it.

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Balfour Browne, K.C., and *Waghorn* (*Freeman*, K.C., with them), for the dock company.

It is true that the Manchester ship canal company had power to charge "reasonable rates" ⁽¹⁾. Merely submitting a classification to the Board of Trade did not make them a railway company. Here the sidings "are used for the purposes of public traffic." The applicants are a "railway company," since they own public railways. The railway company run over the applicants' lines by agreement authorised by an Act of Parliament, and that Act treats those lines as "railways."

COLLINS, M.R. : This is an application by the London and India Dock company in the capacity of a "railway company" for a through rate from its dock or warehouse in the Victoria and Albert Docks to certain places on the system of the Midland railway company.

The application is brought under the 25th section of the Railway and Canal Traffic Act of 1888, which, after providing that railway companies are to afford all reasonable facilities, goes on to say that every railway company having or working

⁽¹⁾ *Ante*, Vol. X. 54.

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railways which form part of a continuous line of railway communication, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways all the traffic arriving by the other, without any unreasonable delay, and without any such preference, or advantage, or prejudice, or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways as a continuous line of communication. The section then proceeds to enact that, subject as hereinafter mentioned, the said facilities to be so afforded shall include the due and reasonable receiving, forwarding, and delivering by every railway company, "at the request of any other such company," i.e., of another railway company, of through traffic to and from the railway of any other such company at through rates. It follows that the applicants are averring for the purpose of this application that they are a railway company, at whose request this through rate is to be granted.

It seems to me in accord with common sense, and also with the terms of the section, that where a railway company is demanding a through rate, it must be a railway company owning a line which forms part of a continuous route. It presupposes that the demanding company has itself a line which is to form a part of that route, not a mere infinitesimal part, but a part which would be substantially treated as part of the *transitus* between two given places. Now in this case the applicants are a dock company, which came into existence under statutory powers for the purpose of making and working docks; and as incident to that purpose, they had statutory powers to lay down rails, or tramways, and generally to bring into existence all the appliances which are ancillary to the working of a dock. I do not propose to go through the numerous clauses in the Acts of Parliament which Mr. Moon, in his very clear argument, has brought to our attention; but I think I am justified in saying this, that in these Acts we do not find provisions treating them as railways which one would expect to find had the Legislature intended to constitute the dock company a railway company for all purposes. The Railway Clauses Acts are not incorporated except for certain purposes which have no relation to the lines involved in this

case. I think that this circumstance throws a strong light on what was the real view of the Legislature in bringing these bodies into existence. They were regarded as dock companies, with the ordinary incidents of dock companies as such; but they were not treated as railway companies in the ordinary sense of the term.

It is said that the dock company comes within the definition of a "railway company" in section 3 of the Regulation of Railways Act, 1879, by which "the term 'railway company' includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament." In order to bring a company within the definition of a "railway company" I think there must, to begin with, be a railway constructed or carried on under the powers of an Act of Parliament. The section enacts that "the term 'railway' includes every station, siding, wharf or dock of or belonging to such railway, and used for the purposes of public traffic"; but it seems to me perfectly clear, and Mr. Balfour Browne did not contend to the contrary, that although the term "railway" includes siding, wharf, or dock of or belonging to a railway, a siding or wharf which is not otherwise a part of a railway does not of itself constitute a railway. Though there be a siding which is used as a siding under statutory powers, I do not think it will be within the definition unless it belongs to a railway. One must find a railway before one can say that the siding is part of it.

In this case the through route, which the applicants set forth as the route in respect of which they desire through rates, is one from the quays and warehouses in the Royal Victoria and Royal Albert Docks to the exchange sidings, and thence over the line of the Great Eastern railway company on to the line of the Midland railway company. In order that the applicants may succeed they must make out that these lines are part of a continuous route. The applicants' share of the route is simply composed of these tram lines, or railways, round about the docks, by means of which they carry on the ordinary business of the dock. In my judgment, these lines cannot be said to form part of a continuous railway route from any place to any other place

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within the meaning of the Railway and Canal Traffic Act, 1888. They are the lines over which the dock traffic is managed, and I think it would be a departure from common sense and the ordinary meaning of terms to hold that these lines, which constitute the ordinary means of dealing with the dock traffic, and moving it from warehouse to warehouse, and so on, are part of a through railway route, or, in the words of the Act, a continuous line of railway communication from one place to another. They were certainly not brought into existence for that purpose, but for the purpose of facilitating the moving of goods from one part of the docks to another. I do not think they form a part of a continuous railway route, which can be made the subject-matter of a through rate.

Looking at the matter broadly, it seems to me that really the dock and the appliances about it are nothing more than a large station, and that all these appliances subsist for the purpose of doing the work which would be done at a station, of moving the traffic about to and fro in the station. They are not part of a line, with a *terminus a quo* and a *terminus ad quem*.

I do not think that counsel for the dock company could have contended here that the applicants had any *locus standi* as a railway company, if he had been driven to rely on those lines only; but the dock company, as it now exists, is the result of a series of amalgamations, and has within it several docks, to some of which railways in the full sense of the term are annexed; and it is contended that the company, being in that sense the owners of railways, can in that capacity claim the position of a railway company, and so be entitled to demand a through rate. The applicants were able to point to two perfectly independent lines, namely, the Royal Albert Dock railway and the Blackwall railway, which formerly belonged to the London Dock company. The first of these railways appears to me to have nothing to do with the point under discussion, not being made part of the route in respect of which the through rates are demanded, for the very good reason that there is only power to carry passengers and small parcels upon it. So, with regard to the Blackwall railway, I do not see how the fact that the applicants are the owners of a railway elsewhere, to which the present application does not

relate, can have anything to do with the discussion. The counsel for the applicants did not insist very strongly that they were a railway company in respect of these railways, and he was obliged to fall back on another point, which was really the only point that ultimately he strongly pressed, namely, that the applicants were entitled to apply for through rates by reason of their ownership of what has been called "the transferred portion of the North Woolwich branch."

The facts with respect to that are these: when the Royal Albert Dock was being constructed, it was found that it would interfere with the existing line of the Great Eastern railway company, which ran across part of the site of the proposed dock, and on to the North Woolwich station; and it would involve a drawbridge being substituted for the old line. Therefore, the Great Eastern company, in order that their traffic might not be interrupted, carried their line under the proposed site of the dock by a tunnel, but they left the old line which had been used before in its old position. That had to be interrupted by a drawbridge, and an arrangement was made whereby that part of the line which was so interrupted, and for which the tunnel was substituted, was handed over for certain purposes to the dock company, the Great Eastern company still retaining the right in special circumstances to pass trains over it, and they have occasionally done so. The dock company on the other hand acquired a right to pass trains over it, just as it passed trains over its own lines. It was argued that the applicants were a railway company within the meaning of section 25, because they were, in respect of this bit of line, the owners of what was part of a fully constituted railway. To begin with, I do not think that, as owners of that bit of line, the applicants can be said to be a "railway company" owning a "railway" in the proper sense of the term. It seems to me that that bit of line has been denuded of its special railway characteristics in the process of transfer to the dock company. The dock company do not possess over it any charging powers whatever, such as the Great Eastern company did possess over it. The dock company simply finds itself with a piece of line which was really a part of a railway proper and was owned by a

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railway company, and they have used it as they have used the rest of their tramways, simply for the purpose of their dock. They can only demand a through rate in respect of a continuous line of railway communication, but most of the route to which their application relates has no connection whatever with this particular bit of line. The traffic coming from the north of the Royal Albert Dock and from the North Victoria Dock would never pass over it at all; and the traffic coming from the south part would pass over a little piece of it.

But counsel for the dock company relied on this piece of line, not so much as in itself justifying the demand of a through rate, as for the following argument. He said that this bit of railway being owned by the applicants, they were entitled to treat all the sidings and approaches to it as part of a railway. I think it would be quite absurd to say that the sidings and the rest of these lines are ancillary in any sense to that bit of railway. It seems to me that that bit of railway has really become merged into the category of what I call the tramways used for dock purposes. I think, therefore, that these lines cannot be called a railway in any sense within the meaning of the Railway and Canal Traffic Act, 1888.

On these grounds I think that the applicants have failed to show anything in the nature of a through route, part of which passes over their own line, and they are not "a railway company" in the sense in which that term is used in the Railway and Canal Traffic Act, 1888, s. 25. But it is said that there is a decision of the Railway Commissioners which concludes this case against the railway companies, namely, the *Manchester Ship Canal Company v. Midland Railway Company* ⁽¹⁾. I was a party to the decision in that case; and I think that, instead of being an authority for the applicants in this case, it is an authority against them. It was decided in favour of the applicants in that case solely on grounds which do not exist here, and but for their existence, the decision must have been the other way. In that case there were special provisions whereby the ship canal company were able to charge tolls on railways, and other statutory powers regulating the tolls and charges which they were to make, and

⁽¹⁾ *Ante*, Vol. X. 54.

we thought that they were therefore in the position of persons who owned a railway in the proper sense of the term, which the public were entitled to use at certain given rates, and that that fact put them in the position of a railway company so as to bring them within the jurisdiction of the Railway Commissioners to grant them a through rate. That was an extreme case, decided on very special circumstances that do not exist here. Therefore, whether that case was rightly or wrongly decided, I think that Sir Frederick Peel, who was a party to that decision and was also a party to the decision in this case, has taken the right view in the present case. He differs from Mr. Justice Wright; and I can say no more than that I prefer his reasoning, which commends itself to me, and with which I agree, to that of Mr. Justice Wright. I think, therefore, this appeal ought to be allowed.

MATHEW, L.J.: I am of the same opinion. I think it is clear that section 25 of the Railway and Canal Traffic Act of 1888, as explained by reference to the provisions of the Regulation of Railways Act of 1873, contemplates a continuous line of railway communication, made up of different complete lines of railway, created by statutory authority. The question is whether that section applies to the circumstances of the present case. It is said that certain tramways, worked by steam, which are provided by the dock company for the accommodation of their traffic, are railways within the meaning of these Acts. I should have thought it was perfectly clear that they are not. They are not part of a continuous line of railway communication from a place on one railway to a place on another. They are means provided by the dock company for carrying on its business in a way convenient to itself. It was said by counsel that one ground on which these lines and sidings could be treated as a railway was that the transferred portion of the North Woolwich branch was a railway constituted by a proper authority created in the ordinary way, and that the lines of tramway and the sidings must be treated as belonging to that portion of railway, and so forming part of a railway system. I am unable to accept the contention that the transferred line retains its old character

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of a railway. It seems to me that it has been practically merged in the system of tramways used for dock purposes. That being so, I think it is impossible to contend successfully that the dock sidings taken by themselves, and in the absence of any railway to which they belong, are a "railway" which is owned by the applicants as a "railway company" within the meaning of the Acts of 1873 and 1888, and I agree that the appeal should be allowed.

[Solicitors for the applicants: *Turner, Son and Foley*.

Solicitor for the Great Eastern railway company: *E. Moore*.

Solicitors for the Midland railway company: *Beale & Co.*]

THE WATERFORD, LIMERICK, AND WESTERN RAILWAY COMPANY

r.

THE POSTMASTER-GENERAL ⁽¹⁾.

Conveyance of Mails—Measure of Remuneration to the Railway Company—Special Trains—Trains timed by the Postmaster-General—The Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98), s. 16—Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), s. 1.

Under the Railways (Conveyance of Mails) Act, 1838, the Postmaster-General may by notice in writing require any railway company to convey mails by ordinary or special trains at such hours as he shall direct, and a railway company required by the Postmaster-General to so convey mails, shall be entitled to such reasonable remuneration as shall be fixed and agreed upon between the Postmaster-General and such railway company, or in case of difference between them as shall be determined by arbitration. The Conveyance of Mails Act, 1893, enacts that where under any Act relating to the conveyance of mails it is provided that any matter of difference relating to any remuneration to be paid by the Postmaster-General to any railway company, shall be referred to arbitration, that matter of difference shall at the instance of any party thereto be referred to the Railway Commissioners instead of to arbitration.

November 8, 9,
22.
1900.

Upon an application to determine the amount of the remuneration to be paid per annum by the Postmaster-General to the Waterford railway company for the conveyance of mails on their railway—

(1) By certain special or notice trains required to be run by notice from the Postmaster-General;

(2) By certain ordinary or agreed trains timed by agreement with the Postmaster-General;

Held, that the remuneration for carrying the mails ought not to include any sum directly representing the capital cost of providing the railway; and, further, that the definite sum to be paid should be of sufficient amount—

(1) To give the railway companies payment for the mails at their ordinary parcels rate less a rebate of one-third of it, in consideration of the usual terminal services in connection with parcels being done in the case of the mail parcels by the Postmaster-General;

(2) To make up to them, when required, the gross receipts of the notice trains to 5s. per train mile;

(3) To compensate them for possible decrease of the receipts of agreed trains due to their times of running being partly fixed to meet postal requirements, the allowance under this head to be a "substantial" one (*per*

(¹) Before WRIGHT, J. and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

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MR. JUSTICE WRIGHT), and (*per* SIR F. PEEL) equal to a guarantee of 3s. 6d. gross receipts per train mile—the cost of working either class of train being taken by agreement at 2s. 7d. per train mile.

Held, also, that these conditions would be provided for by fixing the amount to be paid per annum at 8,000*l*.

THIS was an application under the Conveyance of Mails Act, 1898, and was in the following terms:—

“The applicants are the owners of a railway in Ireland, extending from Waterford to Ennis through Limerick. They have been required by the Postmaster-General to convey mails upon the said railway between Waterford and Limerick, between Limerick Junction and Limerick, and between Limerick and Ennis, by special trains running at hours directed by him as follows:—

TRAINS.

- A. 9.18 A.M.—Limerick Junction to Limerick.
- B. 4.0 P.M.—Limerick to Limerick Junction.
- C. 8.20 A.M.—Limerick to Waterford.
- D. 2.35 P.M.—Waterford to Limerick.
- E. 11.0 P.M.—Limerick to Waterford.
- F. 9.0 P.M.—Waterford to Limerick.
- G. 10.12 A.M.—Limerick to Ennis.
- H. 2.40 P.M.—Ennis to Limerick.
- I. 2.30 A.M.—Limerick to Ennis.
- J. 8.30 P.M.—Ennis to Limerick.

Prior to the 8th September, 1898, the amount to be paid to the applicants for the conveyance of the mails upon the applicants' said railway was fixed by agreements, most of which were made as long ago as 1876 when the circumstances were different, and when the applicants had not the same experience of the cost incurred by them in connection with the postal service and its unremunerative character.

The applicants have been for a long time past dissatisfied with the amount paid them by the Postmaster-General for the conveyance of the mails on said railway, and by notice in writing expiring on the 8th September, 1898, they determined the said agreements with the Postmaster-General, as they were entitled to do.

The sum paid to the applicants by the Postmaster-General

for the conveyance of the mails between Ennis and Waterford, including the service between Limerick and Limerick Junction, was, for the year 1897, 8,959*l*. The said sum did not afford adequate or reasonable remuneration or compensation for the use of the applicants' railway, and for the services rendered by them in the conveyance of the mails.

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The trains which constitute the postal service, and are more particularly described in paragraph 1 of the application, are run at hours which are fixed to suit that service, and the connection which the Postmaster-General requires to be made with the postal service upon other railways. They are not run at times which are convenient for the purpose of the traffic which the applicants' railway serves, and are only used to a small extent for traffic other than the mails. In some instances the times at which they run prejudicially affect the interests of the applicants, and tend to divert traffic from the applicants' system to that of a rival railway company. In the case of the night trains, the applicants' line has to be kept open, and the working hours of their staff continued for this service, and for this service only, and for these and other reasons the expenses of the postal service are exceptionally great. The payment, however, which is made by the Postmaster-General, together with the receipts of the trains, constitute an altogether insufficient remuneration for the special use of the applicants' railway to suit the requirements of the post office, and for the services which they render in respect of the postal service.

The applicants claim as remuneration for conveyance of the mails in the trains specified in paragraph 1 of the application the sum of 20,000*l*. per annum, dating from 8th September, 1898, which the Postmaster-General refuses to pay."

The answer of the Postmaster-General stated that of the trains enumerated in the application some were run by agreement and some by notice given by him to the railway company under the Railways (Conveyance of Mails) Act, 1888. He contended that it was to the interest of the applicants' line to run their trains in connection with the trunk line of the Great Southern and Western railway at Limerick Junction.

He alleged that the sum previously paid by the post office

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was excessive, and that the claim to 20,000*l.* as remuneration was unreasonable.

Balfour Browne, Q.C., and T. Healy, Q.C. (Ernest Moon with them), for the applicants.

In arriving at the remuneration payable by the Postmaster-General for the mail trains, the railway company are entitled to include in the allowance per train mile a sum based on, say, 4 per cent. interest on the capital expended on making the line and acquiring the rolling stock; or, in the alternative, the Postmaster-General should guarantee the same payment from the mail trains as the average profit from the non-mail trains on the system. There is also a loss to be made good on "consequential trains," *i.e.*, trains that had to be put on in consequence of the timing of the mail trains; for example, an earlier goods train was necessary to catch the boat at Waterford, whereas the railway company would have run a mixed stopping train. Where the mails are sent by the ordinary trains of the company the question of making up any loss cannot arise: it is simply a question of fair remuneration for the conveyance of the mail bags.

Attorney-General (Sir R. Findlay, Q.C.) and C. A. Russell, Q.C. (Casserley with them), for the Postmaster-General.

Supposing the cost of making the line had to be considered in arriving at a reasonable remuneration for providing the trains, it would involve an inquiry as to how far capital had been judiciously expended. The railway company must take their privileges *cum onere*. First, payment has to be made for the actual conveyance of the mail bags in all trains; this should be based on the parcel rates, with a deduction for services not performed. Secondly, an allowance must be made to the company for trains which are run under the control of the post office; this allowance should consist of a guarantee for expenses of running, plus, say, 25 per cent. profit.

WRIGHT, J.: In this case I think it is impossible for us to accept the contention which is the real ground and substance of the railway company's claim for increased payment, namely, that

their remuneration for carrying the mails ought to include a sum directly representing the capital cost of providing the railway. There is no general or *prima facie* ground for treating the parcels of the Postmaster-General on a principle fundamentally different from that on which the scale of payments for the carriage of other persons' parcels is fixed, a scale which has been regulated by Parliament, with full knowledge of the cost of the railways. Nor can the company's alternative basis of charge be accepted as satisfactory, founded as it is on the earnings of trains of one kind as compared with the earnings of trains of other and more remunerative kinds. The measure of remuneration suggested by the Postmaster-General on the other side is also, as it seems to me, open to objection. He proposes to allow in the first instance only one-third of the ordinary parcel rates, and to supplement this by treating the notice and agreement trains in substance as if they were special trains run at the cost of the Postmaster-General. Apart from the consideration whether the one-third of the parcel rates is sufficient, and whether a sufficient rate of profit over working expenses is proposed, the principle is open to the objection that the total resulting payment to the company would bear no direct relation to the cost or value of the services rendered by them. If their own traffic were highly remunerative the Postmaster-General would have nothing to pay beyond the one-third of the parcel rates. If the company's own traffic were very unremunerative the Postmaster-General might have very large sums to make up. For example, suppose the company's ordinary traffic by the trains in question were increased by about 11 per cent., the Postmaster-General would have nothing to pay beyond the one-third parcel rates, that is, less than 2,000*l.* If, on the other hand, that traffic should decrease in the same proportion, the Postmaster-General would have over 4,000*l.* more to pay, or a threefold price, although the services rendered by the company and their value to the Postmaster-General would be precisely the same in either case, and there might be no other element of decreased or increased cost or inconvenience.

For the carriage of mails by the railway company's regular

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trains the payment to be made by the Postmaster-General should be *primâ facie* the same as that which the company could and would charge to ordinary traders or other persons for similar services, subject on the one hand to increase in respect of any extraordinary service or element of cost, and on the other hand to decrease in respect of any circumstance which as between two traders would justify or require a discrimination in favour of one over the other. Here there is no evidence of any extraordinary service or element of cost in the case of ordinary trains, except the provision to a very limited extent of special sorting vans, but, on the other hand, the terminal services are much less than in the case of similar traffic carried for ordinary traders; and considering how large an element of cost of the carriage of parcels is constituted by the terminal services, and taking into account the quantity and regularity of the traffic, I think that a substantial reduction should be made in favour of the Postmaster-General. Personally, I think the proportion should be two-thirds.

The carriage of mails by trains which the railway company would not run for their own purposes at all, and which are really special trains run at the request of the Postmaster-General, must be treated differently. The railway company are entitled to be paid for the cost of working these trains, and a reasonable profit on that cost, but they must credit the Postmaster-General with the amount of any receipts from the carriage of other traffic carried in those trains, less so much of those receipts as represents services, such as handling, clerkage, collection and delivery, which are not included in the cost of working the trains. In the case of this company the ordinary cost of working a train is agreed at about 2s. 7d. per train mile. Something more should be allowed in the case of special trains, especially when run at unusual hours, involving extra cost for attendance, lighting, or other services, and I should fix the cost at 8s. per train mile for this purpose, and allow 2s. per train mile for profit (corresponding to a profit of forty out of every hundred of receipts from ordinary traffic), but crediting the Postmaster-General with the whole receipts from passengers, and two-thirds of the receipts from other traffic by these trains. There are

four trains (E, F, I, and J), which I think in substance should be regarded as special trains, and dealt with in this way.

A third head of claim is in respect of trains which are not special trains run at the request of the Postmaster-General, but are ordinary trains in every sense, except that the times of starting, stopping and arrival are modified to suit the exigencies of the postal service. If there is reason to think that the modifications required by the Postmaster-General either cause an extra expense or involve loss of traffic, some corresponding allowance ought to be made to the company. In the nature of things it is impossible for the company to prove in figures the loss which they may sustain as a consequence of interference of this kind. No doubt most of the traffic if it does not go by the trains as altered, goes by other trains, and is not lost:—but the timing of the trains may make a considerable difference. If a train is run at an inconvenient time some passengers will stay at home, or take a different means of conveyance, or leave the neighbourhood. Some kinds even of goods traffic may largely depend for their development or existence upon the circumstance of a train running a little earlier or later, stopping or not stopping at particular stations. I should be prepared to make a substantial allowance on this ground, in view of the evidence given by the traffic manager and by Mr. Wilkinson, of the Great Western, to the effect that the time-table as fixed by the Postmaster-General is inconvenient. On the other hand, there is not, in my opinion, any weight in the company's contention that they should be compensated because the Postmaster-General requires trains to be run in correspondence with the trains of other companies. The advantages of such correspondence probably outweigh its disadvantages, and in any case the maintenance of such correspondence is no more than the ordinary obligation of the company under the Traffic Acts.

There remains only one other head of claim. As a consequence of the limitation by the Postmaster-General of the interval between the arrival of trains at Waterford and the departure of the steamers, it has been necessary to run earlier supplementary goods trains, so as to allow time for the embarkation of goods. Some allowance should be made for this.

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Both parties desire that, instead of our dividing our award according to the several heads of claim, we should award a gross annual sum to be paid as heretofore, and although I have thought it right to indicate the principles on which, so far as I am concerned, our award is to be based, it becomes unnecessary, and indeed impossible, to assess prospectively the exact amounts which ought to be paid. The amount which has for a long time been paid by agreement between the parties is, in my opinion, some indication of what would be just between them, and I prefer to adopt a sum approximating to that in which business men on either side have for so long been able to acquiesce, although it may be somewhat in excess of what might otherwise have seemed reasonable.

The Postmaster-General has, as I have indicated, proposed to allow an insufficient rate for mail bags as compared with other parcels, and an insufficient percentage of profit on working expenses, and after making corrections in these respects, the figures on his principle of calculation work out at not very far short of the amount of the payments which have hitherto been made. On the whole I think that the sum of 8,000*l.* a year is a fair sum to fix.

SIR FREDERICK PEEL: We have in this case to determine the amount that should be paid by the Postmaster-General to the Waterford, Limerick, and Western railway company as remuneration for the conveyance of mails on their railway in the manner required by the post office. The railway over which these mails are conveyed extends from Waterford to Ennis, through Limerick (a distance of 102 miles), and at Limerick Junction crosses the Great Southern and Western railway from Dublin to Cork. The mail service on the applicants' railway is worked in connection with that on the Great Southern and Western line, and the number of the trains used in that service daily is ten. Of these six (one each way between Limerick Junction and Waterford, Limerick Junction and Limerick, and Limerick and Ennis) have their times of running fixed by the post office under the powers of the Railway (Conveyance of Mails) Act, 1838, and are known as notice trains. The other four (one each way between

Waterford and Limerick, and between Limerick and Ennis) are agreed trains as to times, and are run under agreements between the railway company and the Postmaster-General. The payment due to the railway company for the services they perform in the carriage of mails by these ten trains is the question to be determined.

Prior to the 8th September, 1898, the railway company were paid an agreed amount, but the agreements under which the amount was fixed were then determined by the railway company on the ground that the payment was not sufficiently remunerative, and ought to be much larger. On the other hand, the Postmaster-General considers that he was paying under the agreements a great deal more than could be justified as a proper charge, and now that they have been put an end to by the railway company, asks to have the amount settled in the manner provided by the Act of 1898.

The railway company and the post office are not agreed as to the principle upon which the remuneration should be based. To found it largely, as the railway company propose, upon the capital expended in providing the line and its movable stock would not, I think be right, and I do not doubt that the principle that should be adopted is that suggested by the post office. It does not seem to me to be an objection to that principle that the Postmaster-General will under it pay more for the mails by some trains than by others. As parcels the mails will be paid for at the same rate in all cases, but some of the trains in which they are carried will be run at a loss to the railway company through the insufficiency of other traffic, due it may be to the times at which they run, and as they are put on at the instance of the Postmaster-General it is for him to relieve the company from any loss and to undertake that they shall have a fair railway profit. The remuneration then as suggested by the post office will consist mainly of two items, one a charge for the carriage of mails as parcels, and the other a sum in consideration of a certain number of trains being run at times suited to the postal service but, it may be, detrimental to the earnings of those trains considered as passenger trains, or at times, as in the case of trains running on Sundays or at night, when there might be no

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other traffic for which the line would require to be kept open, and provision made for signalling and attendance at stations. As to the first item, the railway company's rates for parcels traffic by passenger trains include collection and delivery, and also much personal labour by the staff at the station, in weighing and otherwise handling the parcels, and the Postmaster-General observes that the mails differ from other parcels in being simply carried along the railway, and requiring no rendering by the railway company of any other service, everything except carriage being done by officials of the post office. On this ground he considers that he ought not to be charged more than one-third of the parcels rates. The other item is the more important of the two. The post office interferes to some extent with the railway company in the management of their line, and the railway company may naturally think that the arrangement of trains and times imposed on them by the post office deprives them of traffic which different arrangements might secure, and that they ought to be indemnified for any unfavourable effect on their gross earnings involved in their working a train service as regulated by the post office. This is not disputed by the Postmaster-General, and the offer is made on his part as to each of the ten trains that if the gross receipts work out at less than 3*s.* 2½*d.* per train mile, he shall make good the deficiency. It is agreed to take the cost at which a mail train is worked at 2*s.* 7*d.*, which is about the average amount per train mile for trains of all descriptions, passengers, goods, and mixed, of the railway company's total working expenditure, and the 3*s.* 2½*d.* offered by the Postmaster-General is a payment of cost of working plus 25 per cent. I think it is rather in favour of the company to take the mileage cost of working the mail trains, including Sunday and night trains, as being equal to the average for all the trains on the line, but as to the allowance for profit, considering the evidence as to the advantage it might be to the company if they could have a less frequent passenger train service and more scope for arranging trains for special kinds of traffic, I should increase it from 3*s.* 2½*d.* to 3*s.* 6*d.*, and the post office guarantee should, I think, be that the company shall not receive less than the working expenses at the agreed amount, plus the difference

between that amount and 8s. 6d. per train mile. This would increase the supplemental payment in the post office table by about 1,400l., or from 3,300l. to 4,700l., and if it is desirable that the payment should be a definite sum I would fix its amount at 5,000l. per annum. Then as to the parcels charge for mails, except where a sorting carriage is part of the train, it is, I consider, fair that there should be a reduced rate for mails as compared with other parcels, but I think a rate of half the usual rate will be a sufficiently lower one. It is said by the company that the mail train which leaves Limerick for Limerick Junction at 4 p.m. used to leave at 3.10 p.m., and that the later time to which it was altered by the post office in 1897 had the inconvenience of obliging them, in order to maintain a connection with a steamboat service as timed to leave Waterford, to put on a new goods train between Limerick and Limerick Junction, and that the earnings of this train being small, under, in fact, 2s. 7d. per train mile, the post office ought to pay them the difference between its receipts and the receipts of a paying train. I think it is enough to say that it does not seem to me that the altering by the post office of the time of a train run under its control, although incidentally it may have had the result complained of, is a sufficient reason for allowing this claim against the post office.

I wish to add that I do not feel certain that I have made a sufficient allowance for profit under all the circumstances, and I agree in the payment the learned Judge proposes should be made.

LORD COBHAM: I agree with the conclusions of my colleagues. The railway company are entitled to payment under two heads: first, for the service of carrying the mail bags; secondly, for any loss incurred by the company, due to the exercise of the Postmaster-General's right to require trains to be run at times fixed by him. As to the first point I am of opinion that two-thirds the full parcels rate would be a fair remuneration to the company. In dealing with the second head we have to answer a very difficult and speculative question, viz., how much would the company earn under conditions which do not exist? I cannot

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say that any method of ascertaining this, susceptible of general application, and not open to serious criticism, seems to me to have been suggested. I think, however, that for the purposes of this particular case the basis suggested by the Postmaster-General is convenient and leads to a conclusion which is consistent with probability, that is to say, after correction of the figures in two material instances. One of these is the charge for carrying the mail bags, which I have already dealt with—the other, which is really the most important point before us, is the rate of profit assumed to be earned by the company's trains used by the Postmaster-General, which must be added to the working expenses in calculating the payment to be made by him. He proposes that only 25 per cent. should be added to the working expenses in respect of this profit, but I do not see how the great difference between this figure and the $66\frac{1}{3}$ per cent., which is the profit earned by the working expenditure over the whole system, can be justified. The company claim that the whole should be allowed, but what we have to do is to make a fair and reasonable bargain between the parties, and bearing in mind that the Postmaster-General is free to have recourse to other means of forwarding his traffic, I think that a lesser percentage, viz., 40 per cent., is a suitable rate to allow. The result would be somewhere near 8,000*l.* a year, and would agree very nearly with that arrived at by my colleagues.

[Solicitor for the Waterford, Limerick and Western railway company: *John O'Connor*, Dublin.]

Solicitor for the Great Southern and Western railway company: *Barrington & Son*, Dublin.]

Solicitor to the Post Office : *Sir Robert Hunter*.]

IN RE TAFF VALE RAILWAY COMPANY ⁽¹⁾.

Proposed Reduction of Particular Rate—Whether Undue Preference or Justified by a Competitive Route—Benefit of Geographical Position—Jurisdiction—Application under Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 29, sub-s. 3.

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Sub-section 3 of section 29 of the Railway and Canal Traffic Act, 1888, enacts —“Where any group rate exists or is proposed, and in any case where there is a doubt whether any rates charged or proposed to be charged by a railway company may not be a contravention of section 2 of the Railway and Canal Traffic Act, 1854, and any Acts amending the same, the railway company may, upon giving notice in the prescribed manner, apply to the Commissioners, and the Commissioners may, after hearing the parties interested and any of the authorities mentioned in section 7 of this Act, determine whether such group rate or any rate charged or proposed to be charged as aforesaid does or does not create an undue preference.”

The Merthyr Vale colliery was equidistant from the main line of the Taff Vale railway company (the applicants) and that of the Rhymney railway company, and was connected with each line by private sidings. The route from the colliery to Cardiff by the Taff Vale was shorter by 18 chains than that by the Rhymney. The Taff Vale charged a uniform mileage rate of $\cdot 575d.$ per ton over their system, while the Rhymney charged a similar rate of $\cdot 551d.$, with the result that the total rate from the colliery to Cardiff was $\frac{1}{4}d.$ per ton more by the Taff Vale route than by the Rhymney route, although the distance was shorter. By section 24 of the Taff Vale Railway Act, 1879, section 90 of the Railway Clauses Consolidation Act, 1845, was incorporated, subject to the proviso “that the company (i.e., the applicants) shall not, in the exercise of the powers conferred by this section, give any undue advantages to traffic passing from or to any of the valleys traversed by the company's present system of railways over traffic of the like description passing from or to any other of such valleys under the same circumstances.”

Upon an application of the Taff Vale railway company, under the first quoted section, with a proposal to reduce their rates from Merthyr Vale colliery to Cardiff to the same sum as charged by the Rhymney railway company, on the ground that while the geographical position of the colliery entitled the colliery owners to a competitive service by the two routes, and the applicants to a share of the traffic, the other collieries on the applicants' line would not be thereby affected in any way.

Held, that there was not sufficient evidence to break in upon the uniform mileage system established over the applicants' and neighbouring railways, taking into consideration section 24 of the Taff Vale company's Act, 1879, as well as the Railway and Canal Traffic Acts.

Quære, whether any public advantage would be served by the proposed

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBBHAM, sitting at the Royal Courts of Justice, London.

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lowering of rate, as the coal would come to Cardiff in any event; and, *quære*, what public interest would be served by a particular colliery having an improved train service.

Held, further, that in the exercise of jurisdiction under sub-section 3 of section 29 of the Railway and Canal Traffic Act, 1888, no order should be made unless the Commissioners are of opinion that all the interests are before the Court, and then only on the fullest possible evidence.

THIS was an application to the Commissioners under sub-section 3 of section 29 of the Railway and Canal Traffic Act, 1888. The applicants, the Taff Vale railway company, proposed to reduce their rates from Merthyr Vale colliery to Cardiff to the same sum that the Rhymney railway company charged from Merthyr Vale colliery to Cardiff, on the ground that that colliery being equidistant from the two companies' lines (to each of which it was connected by private sidings) the applicants were entitled to a share in the traffic, especially as their route was a shorter one by 18 chains than the Rhymney route. The difference in the two companies' rates was due to a different mileage charge which they applied to the whole of their respective systems, the Taff Vale charging *·575d.* per ton per mile over their system, while the Rhymney were content with *·551d.* per ton per mile. The result was that the total rate per ton from the colliery to Cardiff was *11·2125d.* by the Taff Vale route, and *10·724d.* by the Rhymney route, being a difference in favour of the latter route of *·4885d.* per ton. The applicants also leased the Penarth dock and harbour, with the Penarth railway leading thereto; and they contended that the existing difference of rates on the two routes practically closed this dock against the Merthyr Vale colliery traffic; and they therefore desired to reduce their rate also to Penarth, on the same basis as the Rhymney company's rates, but this proposition was withdrawn subsequently during the hearing of the case. The applicants were also subject to section 24 of the Taff Vale Railway Act, 1879, which, while it incorporated section 90 of the Railways Clauses Consolidation Act, 1845, provided that "the company (*i.e.*, the applicants) shall not in the exercise of the powers conferred by this section give any undue advantage to traffic passing from or to any of the valleys traversed by the company's present system of railways over traffic of the like description

passing from or to any other of such valleys under the same circumstances."

The application stated that "in order to enable them to obtain a share of this traffic, the applicants propose to reduce their rate from the said colliery to Cardiff to the sum of 10·724*d.*, and their rate to Penarth dock and harbour to 11·44275*d.*, but as such rates when reduced will yield a lower rate per ton per mile than the applicants are charging for coal traffic in owners' wagons from other collieries on their system to the same places, they are in doubt whether such reduction would not give the traffic from the said colliery an undue preference or advantage over traffic of the like description from other collieries in the Merthyr and other valleys traversed by the applicants' railway, and be a contravention of section 2 of the Railway and Canal Traffic Act, 1854," and further that "the applicants apply to the Railway and Canal Commission for an order determining whether the reduced rates proposed to be charged as aforesaid, to Cardiff docks and Penarth dock and harbour respectively, are or are not a contravention of section 2 of the Railway and Canal Traffic Act, 1854."

The Rhymney railway company, the Barry railway company, the Ocean coal company, the Glamorganshire coal company, the South Wales and Monmouthshire coal freighters' association, and the Cardiff railway company appeared by counsel as objecting to the proposal.

Balfour Browne, Q.C., and *Cripps, Q.C.* (*Noble* with them), for the applicants.

In the case of *Pickering Phipps v. London and North-Western Railway Company* ⁽¹⁾ it was distinctly held that a railway company might, in order to secure traffic, in the interests of the public, reduce its rate to meet competition without giving an undue preference. The terms upon which the coal of this particular colliery is to be carried will not be altered in any way; it will not be put in a more favourable position. The only question is whether the other competing company is to be entirely excluded from having any share in the carriage of that traffic. The traders

(1) *Ante*, Vol. VIII. 83.

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objecting are not affected at all. Assuming the rates over the applicants' whole system to be otherwise reasonable, and there to be this particular form of competition as regards particular collieries, it is unreasonable to suggest that the rates should be lowered all round for this disturbing factor. It is to the public interest that a competitive route should be kept open.

Little, Q.C. (*Loehnis* with him), for the Rhymney railway company.

The proposed alteration in the rates from Merthyr Vale is contrary to the provisions of section 24 of the applicants' own Act of 1879. The railway company having the shorter route now asks for some special assistance from the Court before putting in force a rate, on the ground that they are excluded from competing with a longer route. The whole system of South Wales traffic, which is a mileage one, would be upset by such a decision. The definition of "the public" in the case of *Liverpool Corn Traders' Association v. Great Western Railway Company* ⁽¹⁾ would also apply here; and there is no "public" in the least degree affected. The case of *Pickering Phipps* ⁽²⁾ is also to be distinguished, as it applied to a district where rates were "grouped."

Asquith, Q.C. (*Shaw* with him), for the South Wales and Monmouthshire coal freighters' association.

The traders are the parties most directly interested in this application. Neither the public at Cardiff nor the consignor (who is perfectly satisfied) get any advantage from the proposed change. Taking the case of the two collieries geographically nearer to Cardiff than Merthyr Vale colliery, a lower gross rate would be charged the latter for a longer distance, over practically the same line, which would be a new departure for the Court to authorise. As regards the bulk of the collieries, they are much more distant from the point of discharge of the traffic than the Merthyr Vale colliery, and are already in a worse geographical position. The case of *Pickering Phipps* ⁽²⁾ decides nothing more than this: that the Court may lawfully take into

⁽¹⁾ *Ante*, Vol. VIII. 114.

⁽²⁾ *Ante*, Vol. VIII. 83.

account, as one ingredient for consideration upon the question of undue preference, the existence of a competitive route.

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Moulton, Q.C., and *Shaw* appeared for the Barry railway company, the Ocean coal company, and the Glamorganshire coal company.

A. T. Lawrence, Q.C., and *Trevor Lewis* appeared for the Cardiff railway company.

WRIGHT, J.: This is an important matter, and it is a matter of first impression. No application, we are told, has ever been made under this enactment of the Railway and Canal Traffic Act, 1888, and it is of a very novel kind, and of a very doubtful scope, to my mind. I can conceive that it may be of very much value in a limited class of cases, in whatever class of case it is possible for the Court to know that it has all the interests before it, in the sense of its being fully informed on the matter. Upon questions, perhaps, of rebates, and certainly of undue preference, I can imagine that railway companies might usefully make application under this section. In a matter of this kind we must take care that we do not refuse to exercise jurisdiction merely because it is a new kind of matter, or because it is difficult to deal with. We are bound in a proper case to do the best we can to exercise the jurisdiction which Parliament has intended us to exercise.

Now, as regards the present application, for myself I am very far from expressing any opinion that the Taff Vale railway company may not be able to justify such a reduction of rate as they propose to Cardiff in the case of this colliery, because—although I feel some difficulty in seeing what public interests they will be able to establish (and I take those forms of public interest which Lord Herschell, in the case which has been referred to⁽¹⁾), suggests as public interests which may result from railways acting in their own interest under pressure of competition), because this coal, whether this reduction is made or not, will come to Cardiff, it will come at a low rate, and not an ounce of it will probably be left behind. Therefore one half of

(¹) *Ante*, Vol. VIII. 83.

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the public advantages which Lord Herschell suggests appear not to exist in this case. The only other one that he suggests is that which I might describe as that there might be a better service, being more useful for the public. Here a better service of trains from this colliery no doubt might result from competition, but I cannot at present see how the public would gain any advantage whatever from that. This particular colliery might, but there is a difficulty in seeing what public interests can be served. I see no other kind of interest which is suggested by the extraordinary knowledge and ingenuity of Lord Herschell.

Apart from what I have said, I feel great difficulty in the way of doing anything here. First of all, there are the Railway and Canal Traffic Acts to be considered, but in addition to that there is the enactment in the Taff Vale railway company's Act, 1879, section 24, which, shortly put, enacts that the Taff Vale company shall do nothing to give undue advantage to the traffic of one valley over the traffic of another valley, nor to prefer the Penarth traffic to the Cardiff traffic. That is the scope of the section. Now, under that enactment, a uniform system of mileage for coal has been established throughout these valleys, and I should be very slow to agree to break in, by any act of ours, upon the uniform mileage system without any further knowledge than we have from the evidence before us of what the effect of doing that might be. Nor am I prepared to say that there may not be many cases in this large equalised group of valleys in which the other collieries might not complain under that Act of the Taff Vale, and at any rate of the advantage which this reduction would give to this particular colliery. Certainly, if Penarth had been included in the application they would have had no difficulty in showing a ground of complaint as to many of them.

As regards the exercise of this jurisdiction I wish to say this. I think we are intended to exercise the jurisdiction as a rule only where we can see practically that all the interests are before the Court, and on the fullest evidence we can get. We ought not to act in a case of this kind at all in the dark. If we did act and went wrong it is no sufficient answer to say that persons

aggrieved may apply to rescind. Under the order, if we made it, interests would grow up and become established, and capital would be embarked or be withdrawn, and much more mischief might be done by rescinding the order when made than even by making a wrong order itself. We might easily be made the instrument of injustice if a railway company, without any wrongful intention, came to us and obtained a decision beforehand to the effect that some reduction of rate was not an undue preference; and if afterwards it should be found that injustice was worked, it would be extremely difficult for individuals to upset the order made, and the injury which they had sustained in the meantime could not be undone. I do not think this is a case in which we ought to interfere beforehand.

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SIR FREDERICK PEEL and LORD COBHAM concurred.

[Solicitors for the Taff Vale railway company: *Williamson, Hill & Co.*, for *Ingledeu and Sons*, Cardiff.]

Solicitors for the Rhymney railway company: *Bompas, Bischoff, Dodgson, Coxe, and Bompas.*]

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v.

NORTH BRITISH RAILWAY COMPANY (No. 2) (1).

Reasonable Facilities—Refusing to Deliver at Private Siding—Undue Preference—Jurisdiction—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), ss. 1, 2.

May, 30.
July 11,
1900.

February 23.
March 6, 19,
1901.

Section 2 of the Railway and Canal Traffic Act, 1854, enacts—"Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively. . . ."

By section 1 the word "railway" includes every station used for the purposes of public traffic.

A railway company which had for twenty-eight years received and delivered coal and goods at a private siding belonging to a firm of traders informed the latter that, while they were willing to receive and deliver other goods as before, they would no longer deliver coal at the private siding.

In an application by the traders, the Commissioners found—

(1) That the delivery of coal at the siding was a due and reasonable facility which the railway company were bound to afford, and made an order upon them accordingly; and

(2) That by delivering coal at the private sidings of competitive traders and refusing to deliver it at the applicants' siding the railway company were giving an undue preference to the former, and ordered them to desist from so doing.

On an appeal by the railway company,

Held (1) (by a majority of seven Judges of the Court of Session, consisting of the LORD PRESIDENT, the LORD JUSTICE-CLERK, LORD ADAM, LORD KINNEAR, and LORD TRAYNER—*diss.* LORD YOUNG and LORD MONCREIFF) that the Court of the Railway and Canal Commission had no jurisdiction to order a railway company to deliver traffic at a private siding, such sidings not being part of the "railway" within the meaning of section 2 of the Railway and Canal Traffic Act, 1854, and that the right of the railway company to refuse to deliver traffic at such sidings was not affected by the fact that they had in the past voluntarily received and delivered traffic at the siding in question, or that they were still voluntarily receiving and delivering traffic there in the case of goods other than the particular kind of goods which they had refused

(1) Before Lord STORMONTH DARLING and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Parliament House, Edinburgh.

to deliver; and (2) (by the Second Division of the Court of Session) that the Court of the Railway and Canal Commission had jurisdiction to make the second order appealed against.

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THIS was an application under section 2 of the Railway and Canal Traffic Act, 1854.

The applicants were paper makers, carrying on business at Valleyfield, Penicuik. They had constructed a siding connection with one of their mills at the same time as the construction of the railway of the Penicuik company, which company was afterwards amalgamated with the North British railway company.

The siding in question was called the Low Mill siding, and left the respondents' line outside the Penicuik distance signal, 22 chains from Penicuik station. From the time of the opening of the railway down to 1900 practically the entire traffic consigned to or sent out by the applicants was regularly delivered or lifted by the respondents from the private sidings of the applicants.

In 1900 a dispute arose as to the rebate to be allowed on the applicants' coal traffic. The railway company thereupon gave notice that they would cease to accept or carry coal for delivery at the applicants' Low Mill siding, and requested the applicants to make arrangements to take delivery of their coal at Penicuik station. The railway company, while continuing to deliver all other traffic except coal at the Low Mill siding, insisted on carrying the applicants' coal to Penicuik station, which involved passing the applicants' siding on the way, and refused to book or carry coal from the collieries to the siding. The railway company requested the applicants to send their private locomotive from Low Mill siding to Penicuik station, a distance of over a quarter of a mile, to take the trucks of coal back to the siding, and proposed to charge the applicants a toll of 2*d.* per ton for the use of the line. Alternatively they offered to send the coal back by their own engine for a charge of 3*d.* per ton. In either case they insisted upon charging for the future the full rate to Penicuik station.

The applicants applied to the Court for an order—(1) enjoining the respondents to afford to the applicants all reasonable facilities for the receiving and forwarding and delivery of traffic upon and from their sidings, and for the return of carriages,

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trucks, and other vehicles; (2) declaring the arrangements and facilities for such traffic existing prior to 1900 between the applicants and respondents to be reasonable; (3) enjoining the respondents to restore, and to desist from again interrupting such facilities, and obstructing the applicants in the exercise thereof; (4) ordering them to desist from subjecting the applicants to an undue or unreasonable prejudice or disadvantage in respect of the use of their sidings, and to desist from giving to other traders or to themselves any undue preference or advantage over the applicants.

The railway company pleaded that the Court had no jurisdiction to pronounce an order requiring them to stop trains at Low Mill siding in order to deliver coal for the applicants there, and that they were not bound to stop their trains there.

Ure, Q.C. (Clyde with him), for the applicants.

At the time the siding connection was made by the traders under section 69 of the Railways Clauses Act, 1845, three defences were open to the railway company, but they had not then shown any prejudice either to the safety of the public or to the railway, or to the traffic thereon. The case of *Portway v. Colne Valley Railway Company* ⁽¹⁾ is an authority that a railway company is not entitled to sever a siding connection; and a railway company cannot, without showing reason, prevent a siding constructed under statutory powers from being used. Section 2 of the Railway and Canal Traffic Act, 1854, is quite general; facilities have to be given for the delivery of traffic "from the railway," this does not distinguish a siding from a station. Section 1 of the same Act does not give a definition of a "railway"; the word "includes" there used does not mean that everything else is excluded. So long as the railway company treat the Low Mill siding as a place for the receiving, forwarding and delivery of goods, they cannot close it to certain kinds of traffic without showing to the satisfaction of the Commissioners that such partial closing is under the circumstances reasonable. To refuse to deliver the applicants' coal traffic is not only unduly preferring other traders; it is an undue

⁽¹⁾ *Ante*, Vol. VII. 102.

preference in favour of the railway company themselves, because they propose a longer route than the route formerly taken.

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Dean of Faculty (Asher, Q.C.), and Solicitor-General (Dickson, Q.C.) (G. Grierson with them), for the railway company.

Stopping at a private siding is not a "facility" within the meaning of section 2 of the Railway and Canal Traffic Act, 1854. If it were so, every adjoining landowner could make a connection, and require trains to be stopped at a point not selected by the railway company. The cases of the *South-Eastern Railway Company v. Corporation of Hastings* ⁽¹⁾ and of the *Darlaston Local Board v. London and North-Western Railway Company* ⁽²⁾ affirm the absolute discretion of a railway company as to where they are to put or not to put a station. In section 1 of the Railway and Canal Traffic Act, 1854, a "railway" is defined to include a public station; it is there the facility of "receiving" and "delivering" is to be given, while it is on the line itself the facility of "forwarding" is to be given. The point of connection with a siding may be compared to a private station, to which the Act does not apply. The connection authorised by the Railways Clauses Act, 1845, was for the purposes of getting on or off the main line of railway. This right is conceded, and there is no proposal to interfere with the siding connection as in *Portway v. Colne Valley Railway Company* ⁽³⁾. The railway company, as carriers, have no duty in regard to such junctions.

SIR FREDERICK PEEL: Messrs. Cowan are paper makers, carrying on business in the Penicuik district, and have in connection with one of their mills a siding called Low Mill siding. This siding forms a junction with the Penicuik railway, now North British, 22 chains north of Penicuik station, and was constructed by Messrs. Cowan on their own land and at their own expense at the same time as the Penicuik railway, and has been in use ever since that railway was opened in 1872. Its incoming traffic consists chiefly of coal from Arniston and

⁽¹⁾ *Ante*, Vol. III. 464.

⁽²⁾ *Ante*, Vol. VIII. 216.

⁽³⁾ *Ante*, Vol. VII. 102.

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other collieries, and of esparto grass and rags from Granton, Leith, and other places, and the total yearly tonnage is very considerable, that of coal alone exceeding 80,000 tons. In November, 1899, Messrs. Cowan claimed to have a rebate off the company's coal rate, on the ground that it included the Penicuik terminal for station accommodation, or that it did not differ in amount from the coal rate to the station, although in the one case station accommodation was provided, and in the other was not. On 10th of March last, before the above claim could be heard, they received notice from the respondents that from and after 22nd of March they would no longer accept or carry coal for delivery at the Low Mill siding, and that Messrs. Cowan must make arrangements for taking delivery at Penicuik station. They stated they were under no obligation to stop trains specially at Low Mill siding, either to give or take delivery of traffic there, and that they had resolved to cease to do so with regard to coal after 22nd of March. They have continued to deliver all other traffic as before at the siding. Upon this state of facts, Messrs. Cowan apply to us to determine whether, having regard to the obligations as to facilities imposed on railway companies by the Traffic Act, 1854, and to the railway company continuing to carry coal and other traffic to and from the private sidings of other persons, as well on the Penicuik railway as all over the North British system, they have not a right to require the railway company to deliver coal at the Low Mill siding. Section 2 of the Act enacts that every railway company shall, according to their powers, afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from the railway worked by such company, and Messrs. Cowan contend that the refusal of the respondents to deliver coal at the junction of their railway with the Low Mill siding is a contravention of the Act. It is part of the argument for the North British that the word "railway" is defined in that Act to include stations used for the purposes of public traffic, and that this implies that a railway company is only bound to carry goods to and from stations on the railway. I do not think that section 1 (the interpretation clause) has this effect in determining the liability of a company as to delivery. All that

it seems to do, so far as delivery is concerned, is to make a station and station ground a place at which the railway company shall give reasonable facilities for delivering traffic from it. It becomes a company's duty so to act, because a station used for purposes of public traffic is made part of the company's "railway" within the meaning of the statute; but section 2 applies equally to every part of the railway, and I think that any place on a railway which, though not a station, has been made by the company's course of dealing with its business a usual terminus of the transit of particular traffic, is a place where it ought and can be required to deliver. Such a place is, in the case before us, the junction of the Penicuik railway with the Low Mill siding. The junction is in a good position for the company's using it, and the siding has been conveniently laid out for exchanging trucks with the railway, and coal has been carried to it uninterruptedly since the railway was opened in 1872. It is not suggested that the safety or convenience of the public affords any reason for a change, and it may be taken upon the evidence that not only is the station unprovided with the accommodation that is wanted for the unloading and other requirements of a coal traffic of the quantity of Messrs. Cowan's, but also that the only place at the side of the railway where such accommodation is supplied is the Low Mill siding. Looking at these circumstances, I think it is a reasonable facility within the meaning of the section that the respondents should stop their trains at the entrance of the siding, and deliver trucks intended for it by detaching and depositing them clear of the running line. It makes it, I think, the more reasonable that this facility should be given, that the company has obtained a monopoly of the carrying trade on its railway, and has made it impossible for siding traffic to be worked by the siding proprietors as contemplated by the Act (Railways Clauses Act, 1845), which gives them the right to connect their siding with the railway.

Messrs. Cowan further state that there are other paper makers in the Esk valley, and that there is a private siding at Esk Mills, half a mile north of Penicuik, and another at Delmore Mills, two miles from the station, and that at both these places

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the respondents are still delivering coal, and they complain that in the conveyance and delivery of coal they are subjected to a disadvantage from which other persons under no differing circumstances are exempted, and have not received that equality of treatment to which the Act of 1854 entitles them. The respondents have shown no good reason to justify the difference complained of, and I think they ought to be enjoined to give Messrs. Cowan the same facilities in the conveyance and delivery of coal that they give to other traders on the Penicuik railway.

LORD STORMONTH DARLING : In this application for reasonable facilities under the Railway and Canal Traffic Act, 1854, it is said by the railway company that we have no jurisdiction to compel them to stop their goods trains at Low Mill siding for the purpose of delivering the applicants' coal. This argument is founded mainly on the *Hastings Case* ⁽¹⁾, and the *Darlaston Case* ⁽²⁾.

Now, I take it that this Commission sitting in Scotland is as much bound by a decision of the English Court of Appeal as if it were sitting in England, when the decision turns entirely upon the construction of a British statute. Accordingly, I accept implicitly the judgments in these two cases. The *Hastings Case* lays down the proposition that we have no jurisdiction to order a railway company to make a new railway station, and the *Darlaston Case* that we have no jurisdiction to make an order involving the re-erection *ex intervallo* of a station which has been closed. Both proceed upon the ground that there is no obligation upon a railway company to establish a station at any particular place, or, indeed, to work or maintain its line at all. But in the *Hastings Case* Lord Selborne was careful to guard himself against any undue limitation of the powers of this Commission. After stating the proposition that a company is not bound to establish a station at any particular place, unless it thinks fit to do so, his Lordship added, "But when the company has in fact opened a station at a particular

⁽¹⁾ *Ante*, Vol. III. 464.

⁽²⁾ *Ante*, Vol. VIII. 216.

place, and actually uses it for the purposes of public traffic, and invites the public to resort to it for the purpose of being received or delivered as passengers to or from trains announced as starting from or stopping at that station, or of having their goods received there for carriage or delivered there after carriage, it is, in my opinion, bound by the Act to afford at that station (to the extent of its powers) all reasonable facilities for receiving, forwarding, and delivering such passengers and goods." Accordingly, if Lord Selborne had been dealing with a case in which a company refused to deliver a particular description of goods addressed to a particular trader at a public station, which was in full use for goods traffic, I conceive that his Lordship would have had no hesitation in sustaining the jurisdiction of this Commission to pronounce upon such a proposal as unreasonable, unless the company were able to adduce some good reason in support of it.

Now, of course I am aware that a public station is not the same thing as a private siding. A public station is part of the railway, and a private siding is not. But this siding was formed and connected with the branch line under the provisions of section 69 of the Railways Clauses Consolidation (Scotland) Act, 1845. It was formed by the applicants at a cost (not including land) of over 6,000*l.*, and their actual outlay in maintaining it is about 500*l.* a year. It is at this moment in full operation, and there is no proposal on the part of the railway company to discontinue its use, except as regards coal. They are still willing to stop their trains there for the purpose of taking up and setting down the large general traffic of the applicants. The practical result of their proposal would often be (as shown by the figures given in Mr. Garden's evidence) that, having a mixed goods train composed of some trucks containing coal for the applicants and other trucks containing general merchandise, they would stop the train, uncouple the one set of trucks, and then carry on the others a quarter of a mile beyond their true destination. There is, therefore, no question of putting the respondents to loss or inconvenience, or of interfering with the legitimate discretion in the conduct of their business. A great deal must always be left to the discretion of a railway company,

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and, in judging what is a "reasonable facility," we are bound to consider what is reasonable in the interests of the company itself, as well as what is reasonable in the interests of the public or of a private trader. But here, if we do what the applicants ask, we shall not be dictating to the company how to marshal their goods trains, or what particular trains they are to stop; we shall only be requiring that they shall continue to deliver the applicants' coal in the same way as they have been doing for more than twenty years, and as they still propose to do in the case of all the applicants' other traffic.

Accordingly, it seems to me that, although this is a private siding, it falls within the principle laid down by Lord Selborne in the passage which I have quoted. That principle is, that when a railway company has in fact instituted a practice, which it proposes to continue, of receiving and delivering traffic at a particular place on its system, it ceases to be absolute master of the mode in which the traffic at that place is to be conducted, but is bound to afford all reasonable facilities for receiving, forwarding, and delivering it. The owner of the siding has just as much interest to complain of any capricious alteration in the *status quo* as the public would have in the case of a public station. And the words of the statute are not limited to delivery at a public station, but extend to delivery from any part of the railway system. It is a different question whether we could compel a railway company to deliver goods at a newly-constructed siding, and I express no opinion with regard to that.

I am therefore of opinion that our jurisdiction to entertain this application is clear. If so, there can be no doubt that we ought to exercise it, because the railway company has not advanced a single reason in support of it.

I propose that we should make an order requiring the respondents to afford the applicants all reasonable facilities for delivering their coal traffic at the Low Mill siding, and declaring the arrangements and facilities for the delivery of such traffic which existed before 22nd March, 1900, to have been reasonable, and such as ought in future to be afforded.

LORD COBHAM concurred.

The Court issued the following Order :

" This Court doth find and determine : 1. That the railway company in refusing to deliver coal at the junction of their railway with the Low Mill siding have not afforded to the applicants all due and reasonable facilities for the delivery of their coal traffic at the Low Mill siding.

2. That the railway company in delivering coal at the private sidings of other traders, near Penicuik, competitors in trade with the applicants, and refusing to deliver coal at the applicants' Low Mill siding, have given to such traders an undue and unreasonable preference and advantage over the applicants, and subjected them to an undue and unreasonable prejudice. And this Court doth declare that the facilities given by the railway company up to the 22nd day of March, 1900, for delivery of the applicants' coal traffic at the Low Mill siding were reasonable, and such as ought to be afforded by the railway company to the applicants. And this Court doth order and enjoin the railway company, and their servants and agents, to afford all reasonable facilities for the delivery of the applicants' coal traffic at the Low Mill siding, and to desist from giving to traders, competitors in trade with the applicants, any undue and unreasonable preference or advantage over the applicants in respect of the delivery of coal at sidings not belonging to the railway company, and from subjecting the applicants to undue and unreasonable prejudice and disadvantage in respect of such delivery of coal at the Low Mill siding."

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The railway company appealed against this order.

On February 23rd, 1901, the Court of Session intimated that they were of opinion that the second finding of the Commissioners (with regard to "undue preference") and the order following thereon, was within the jurisdiction of the Commissioners.

With regard to the first finding (relating to "reasonable facilities") and the order following thereon, the Second Division of the Court of Session appointed the case to be heard before that Division, with the assistance of three Judges of the First Division ; so the case was heard before a Court of seven Judges on March 6th, 1901.

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Ure, K.C., and Clyde, for the railway company.

The Railway Commissioners' powers to order a railway company to afford reasonable facilities in receiving and delivering traffic are defined by section 2 of the Railway and Canal Traffic Act, 1854. That section applies only to the railway as a route for public traffic, and to stations, as defined by section 1, *i.e.*, stations used for the purposes of public traffic. It has no application to a private siding, which is not part of the railway.

Dean of Faculty (Asher, K.C.), Solicitor-General (Dickson, K.C.), and Grierson, for Messrs. Cowan.

The Commissioners have jurisdiction to order the railway company to desist from giving an undue preference to other traders to the prejudice of Messrs. Cowan. The provisions of section 4 of the Railway and Canal Traffic Act, 1894, show that the Legislature regard the reception and delivery of goods at private sidings as part of the ordinary business of a railway company.

LORD PRESIDENT : The applicants are paper makers, carrying on business at Valleyfield, near Penicuik, and the respondents own and work a public line of railway which terminates at Penicuik station. That line was originally constructed by the Penicuik railway company, and opened for traffic in 1872. At or about that time the applicants, or their predecessors in title, laid down three sidings from three of their mills opening on to the line of railway now belonging to the respondents, and first the Penicuik railway company, and afterwards the respondents, since they acquired the line, received and delivered the applicants' traffic at these sidings until the differences aftermentioned arose. The present question relates to one of these sidings—Low Mill siding—which connects with the respondents' line outside Penicuik distance signal 22 chains from Penicuik station. This siding has been in use since the railway was opened, the incoming traffic being chiefly coal, esparto grass, and rags, for the applicants' works.

In November, 1899, the applicants claimed a rebate from the respondents' coal rate upon the ground that it included a terminal

charge for station accommodation and terminal services, and that the coal did not receive any such accommodation and services at Penicuik. The respondents then, on 10th March, 1900, gave notice to the applicants that from and after the 22nd of that month they would not accept or carry coal for delivery at the applicants' Low Mill siding, that they were under no obligation to stop their trains specially at that siding for the purpose of giving or taking delivery of the applicants' traffic, and that they had resolved to cease to do so with regard to coal after that date. They accordingly requested the applicants to make arrangements to take delivery of their coal at Penicuik station, and to advise the collieries from which they purchased. The applicants then, on 3rd April, 1900, presented the present application praying the Railway Commissioners for an order enjoining the respondents, *inter alia*, to afford to the applicants the same facilities at Low Mill siding as they had previously enjoyed. A proof was led, and thereafter the Railway Commissioners on 6th August, 1900, found and determined, *inter alia*—(1) "That the railway company in refusing to deliver coal at the junction of their railway with the Low Mill siding, have not afforded to the applicants all due and reasonable facilities for the delivery of their coal traffic at the Low Mill siding." The respondents appealed against the findings of the Railway Commissioners, and with reference to the finding and determination above quoted, with which alone we have to deal, the respondents maintain that the Railway Commissioners had not jurisdiction to make it.

It may be convenient to consider the question thus raised under two heads—(1) Whether the Railway Commissioners would have had jurisdiction to make such a finding if the respondents had not previously received or delivered any traffic at the siding; and (2) Whether, if upon that state of facts the Railway Commissioners would not have had jurisdiction, the circumstance that traffic of the applicants had in fact been received and delivered at the siding confers jurisdiction upon them. Under this second head it will be proper to consider, *separatim*, whether, if the Railway Commissioners would not have had jurisdiction if the respondents had intimated that they

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 declined any longer to receive or deliver any traffic at the siding, the result is varied by the circumstance that their refusal has hitherto been limited to one particular kind of traffic, viz., coal.

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 The decision of the question depends upon the construction and effect of certain statutory provisions to which I shall now advert.

The right of owners of land adjoining a railway to make connection with it by sidings is conferred by section 69 of the Railways Clauses Consolidation (Scotland) Act, 1845, which provides, *inter alia*, that that or the special Act shall not prevent the owners or occupiers of lands adjoining to the railway, or any other persons, from laying down either upon their own lands or upon the lands of other persons with the consent of such persons, any collateral branches of railway to communicate with the railway for the purpose of bringing carriages to or from or upon the railway, and that the company shall if required, at the expense of such owners and occupiers and other persons, and subject to certain qualifications not material to the present question, make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication. It is plain that this section contemplates that the persons entitled to make the connection shall work it with their own vehicles and provide their own haulage and servants, no obligation being laid upon the railway company owning the line, except to permit them to enter upon and use it as a road, on payment of tolls, as provided by section 85. In particular the section contains no provision that the railway company shall render any services in working the siding or that they shall be bound to stop any of their trains for the purpose of receiving or delivering traffic at it.

The next important statute bearing upon the question is the Railway and Canal Traffic Act, 1854. By section 1 of that Act it is declared that the word "railway" shall include every station of or belonging to such railway used for the purposes of public traffic, and by section 2 it is declared, *inter alia*, that every railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving

and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles. Lord Esher in the *Darlaston Case* said: "It seems to me a necessary implication that the word 'railway' in section 2 does not include a station which is not in use for the purposes of public traffic," and this proposition appears to be indisputably correct.

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It is, as I understand, upon this section that the claim of the applicants is founded, their contention being that the receiving and delivering of traffic at the siding are reasonable facilities within the meaning of the section. None of the Commissioners express any opinion as to whether they would (in their judgment) have had jurisdiction under this section to make the finding and determination which they have made if there had not been any previous usage of receiving and delivering traffic at the siding, their decision being (apparently) founded exclusively upon the usage which has taken place, and Lord Stormonth Darling says, in his judgment: "It is a different question whether we could compel a railway company to deliver goods at a newly constructed siding, and I express no opinion with regard to that." It seems to me, however, to be very essential or, at all events, very material to form an opinion upon this question before proceeding to consider the effect (if any) of the previous course of dealing between the parties.

I am of opinion that the Commissioners have not jurisdiction to order a railway company to receive or deliver traffic at a private siding at which no traffic is being or has previously been received or delivered by the company. While section 1 of the Act of 1854 declares that the word "railway" shall include every station of or belonging to it used for the purposes of public traffic, it makes no mention of private sidings, and its language, in my judgment, plainly excludes the idea that such sidings form any part of its undertaking. They are the private property of the persons who by the use of them obtain access to the railway; and in the absence of any statutory provision that the railway company shall stop its trains at or serve such private sidings, I consider that no duty to do so can reasonably

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be implied. The persons owning the sidings are not bound, apart from agreement, to send their traffic or any part of it over the railway company's line, and even if they did so for a time, or as regards some kinds of traffic, they would not be bound to continue to do so as regards any kind of traffic.

Again, the Railway Commissioners have no power to enjoin things merely because they may think that they would be reasonable facilities; they are only entitled to administer the existing railway Acts, and to enforce facilities thereby provided where such facilities are refused.

In the *Hastings Case* ⁽¹⁾ Lord Selborne said: "The first observation which arises upon this enactment (36 & 37 Vict. c. 48, which transferred to the Railway Commissioners the power which had previously been vested in the Court) is that it does not enable the Commissioners to impose upon a railway company any new duties or obligations depending upon any mere exercise of the Commissioners' own judgment. Their authority is only to inquire into and to prevent particular violations and contraventions of the statute"; and no statute has been contravened in this case.

I am therefore of opinion that the first question above stated should be answered in the negative.

The second question is whether an obligation upon a railway company to receive and deliver traffic at a private siding, not imposed by any Act of Parliament, arises from the fact that traffic has been for a longer or shorter time received and delivered by the company at the siding, and whether this creates a jurisdiction in the Commissioners to order the continuance of such reception and delivery which they would not, apart from the prior usage, possess. The Commissioners appear to have considered that this question should be answered in the affirmative, and I gather from their opinions that it is upon this ground alone that they felt themselves warranted in making the finding and determination now under consideration. Sir Frederick Peel says: "I think that any place on a railway which, though not a station, has been made by the company's course of dealing with its business a usual terminus of the

⁽¹⁾ *Ante*, Vol. III. 505.

transit of particular traffic, is a place where it ought and can be required to deliver. Such a place is, in the case before us, the junction of the Penicuik railway with the Low Mill siding." And Lord Stormonth Darling, after referring to the *Hastings Case* ⁽¹⁾ and the *Darlaston Case* ⁽²⁾, says that it seems to him that although this is a private siding it falls within the principle laid down by Lord Selborne in the passage which he quotes, adding: "That principle is, that when a railway company has in fact instituted a practice, which it proposes to continue, of receiving and delivering traffic at a particular place on its system, it ceases to be absolute master of the mode in which the traffic at that place is to be conducted, but is bound to afford all reasonable facilities for receiving, forwarding and delivering it. The owner of the siding has just as much interest to complain of any capricious alteration in the *status quo* as the public would have in the case of a public station." Lord Cobham does not deal expressly with the question, but he agrees with his colleagues upon all the points considered by them.

I am not sure whether the Commissioners mean that where traffic has been for a longer or shorter time received and delivered by a railway company at a private siding the company would not be entitled after due intimation to cease to receive or deliver any traffic at it but would be bound to go on receiving and delivering traffic as before, or whether they only mean that so long as the company receives or delivers any kind of traffic at a private siding it is bound to receive and deliver all kinds of traffic there; and I shall therefore deal with both views.

It appears to me that the first view is at variance with the principle on which the decision in the *Darlaston Case* ⁽²⁾ proceeded. It was there held that a railway company is not bound to make or to continue a station at any particular place, although where it has elected to make a station and to keep it open for traffic it is bound to give reasonable facilities at it, because it is part of the railway within the meaning of the Act of 1854. I think the same considerations apply *à fortiori* to prevent a company from being required to continue to receive

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⁽²⁾ *Ante*, Vol. VIII. 216.

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and deliver traffic at a private siding where it has done so voluntarily (practically by agreement) so long as the terms given by the traders for its voluntary services were satisfactory. As I have already pointed out, private sidings are not parts of the railway within the meaning of the Act of 1854 or of any other Act, and consequently to require the company to receive and deliver traffic at a private siding would be to require it to give facilities not imposed upon it by any statute. The sidings are private property not falling within the definition of railway, and they are places at which a railway company is not, in my judgment, bound to stop its trains, and to which it is not bound to send its locomotives, wagons or servants unless the Commissioners are right in holding that the effect of usage is to compel them to do so. Further, it appears to me that it would not be reasonable to hold that the mere circumstance of parties, *ex hypothesi* of this part of the argument, not under statutory obligation to do so, having found it to suit their mutual convenience on terms mutually satisfactory to receive and deliver traffic at a private siding, reared up a permanent obligation against one of them (the railway company) to continue to do so when the terms offered were no longer satisfactory to the company. In this case the applicants altered the *status quo* by claiming a rebate on coal traffic, in respect that it did not receive station accommodation or terminal services at Penicuik, and it appears to me that the respondents were just as well entitled to say that they would no longer receive and deliver traffic at the siding as the applicants were to say that they declined to pay a rate which they considered excessive. In other words, the effect of the applicants terminating, as they were quite entitled to do, the tacit agreement under which the siding had been served was in my judgment to remit the parties respectively to their original positions, so that the question must now be determined in the same way as if the respondents had never rendered any services at the siding. If I be right in thinking, for the reasons already given, that in their inception the services rendered by the respondents at the siding were voluntary, I can see no reason why they should not be at least as well entitled to cease altogether to serve the siding as a

company is to pull down or close one of its public stations. I do not suppose that the fact of an owner of adjoining land having made a siding and used it for receiving and delivering traffic from and to the railway as long as it suited him to do so would bind him to send his traffic over the company's line by that siding in all time coming, and if the one party to the voluntary dealing is not bound to continue it in perpetuity, neither should the other, in the absence of any statutory obligation, be held bound to do so.

It is a different question whether so long as a company continues to serve a siding as to some kinds of traffic it is thereby bound to serve it as regards all kinds of traffic. In this part of the argument, I assume for the reasons already given that the service by the respondents at the siding was at its inception voluntary, and I can see no reason why they should not have been entitled at the beginning of the dealing to express their willingness to receive and deliver some kinds of traffic while refusing to receive and deliver other kinds. If this be so I have equal difficulty in seeing any good reason why, if it no longer suits their interests or convenience to receive and deliver some kind or kinds of traffic at a siding, they should not be entitled to cease to do so. The Commissioners assimilate the case to that of a public railway station, but the two cases appear to me to be essentially different. The public station is part of the company's undertaking, which the private siding is not, and the statutory obligations applicable to the one are not applicable to the other. It might well be held that by opening a station for the public traffic a company professes or holds itself out as being ready to accept all kinds of traffic (or at least all kinds which it can accommodate), and that therefore it could not arbitrarily refuse some particular description of traffic; but these considerations have no application to the case of a private siding as to which the company makes no profession and does not hold itself out as willing to do anything. In expressing the opinion that the fact of a railway company serving a private siding as to some kinds of traffic does not raise an obligation to serve it as to all kinds of traffic, I of course leave out of view any question of undue preference or unequal treatment, our opinion not being asked

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upon these questions. The questions with which we have to deal must be considered as if there were no other paper makers, and no other private sidings than those belonging to the applicants in the Penicuik district.

I quite recognise that service by a railway company which is in its origin voluntary may, so long as the company continues to give it, be subject to regulation by the Railway Commissioners in some cases and in some respects. Thus railway companies are not bound to collect and deliver traffic outside the limits of their undertaking, but if they choose to do so, they may be subject to regulation as regards rates and equality of treatment. Thus it is provided by the North British Railway Rates and Charges Act, 1892, s. 5, that the company may charge for the services therein mentioned, when rendered to a trader at his request or for his convenience, a reasonable sum by way of addition to the tonnage rate, and that any difference arising under the section shall be determined by an arbitrator appointed by the Board of Trade, and two of the services mentioned are "services rendered by the company at or in connection with sidings not belonging to the company," and "the collection or delivery of merchandise outside the terminal station;" but I do not understand that there is any obligation upon the company to render these services at all unless it holds itself out as willing to do so. These are all services either prior or subsequent to conveyance, but if they are offered and given by the company, and accepted by the trader, it is not unreasonable that the rate to be paid for them should be subject to independent regulation in view of the practical monopoly of the business of carrying enjoyed by railway companies in many places. Again, by the Railway and Canal Traffic Act, 1894, s. 4, it is provided that where merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway company does not provide station accommodation or perform terminal services, the Commissioners shall have jurisdiction to hear and determine

such dispute and to determine what, if any, is a reasonable and just allowance to make; and I understand the applicants to suggest that this implies the existence of a legal obligation on the part of a railway company to receive and deliver traffic at private sidings. It does not, however, appear to me that any such implication can reasonably be derived from it. Where an authorised rate contains a charge for terminal services at both ends, and terminal service is only rendered at one end, it is reasonable that a deduction should be allowed, but this does not in my judgment imply any obligation upon a railway company to give services at private sidings. The only enactment is that if they choose to do so the rates shall, like the rates for collection and delivery of traffic by cartage in a town, be subject to regulation. The considerations of policy which warrant the regulation of the charges to be made for services which are voluntary, are very different from those applicable to the question whether the fact of siding services having been voluntarily rendered for a time authorises the Commissioners to order that they shall be given in perpetuity, or to the question whether the fact of some kinds of traffic being received or delivered by a railway company at a private siding warrants the Commissioners in ordering the company to receive and deliver all kinds of traffic there. I am not aware that it has ever been held that if a railway company desired to cease to collect and deliver goods and parcels by carts outside of its undertaking, or to provide private omnibuses for the use of passengers, it would not be entitled to do so.

For these reasons I am of opinion that the fact of the respondents having for a time voluntarily served the siding on terms satisfactory to themselves does not give the Commissioners jurisdiction to compel them to continue to serve it upon terms which they do not regard as satisfactory, and that the fact of their receiving and delivering some other kinds of traffic at the siding does not empower the Commissioners to order them to deliver coal there.

LORD JUSTICE-CLERK: By the determination of the Railway Commissioners which is under consideration, the North British railway company is found to be refusing to afford

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reasonable facilities to a trader for delivery of goods at a place called Low Mill siding. That siding is not part of the company's system, but is a siding made by the private trader, under the powers of the Railways Clauses Act under which any citizen who desires to have a siding in communication with a public railway line is entitled to make such a siding, and to call upon the company, at his expense, to put in the necessary railroad junction so that the siding may be utilised for goods in bulk in wagons that can run upon the line being taken into or removed from the siding. The statutory provision by which a citizen can have a connection established with the public railroad was part of the railroad scheme of the time at which the Act was passed, viz., that the citizen should have a right to use the road with his own haulage and wagons on paying the proper tolls to the railroad company. That was the purpose of conferring on him the right to have a siding. He had no right to require the company to haul to his siding and deliver there, or to call at his siding to take up wagons. In course of time, and as railway traffic developed, it became more convenient for both parties for the railway companies to do all the haulage work by arrangement with the citizen, the railway company carrying traffic to their stations, and where the company and the citizen could agree upon terms for bringing goods to or from private sidings the company finding the haulage and service for that work also. Accordingly in the past similar traffic to that which the company now refuse to deliver at the siding in question has been carried there and removed from there by them. Messrs. Cowan having raised a dispute as to what they were to pay for the service, the railway company have intimated their intention to discontinue hauling Messrs. Cowan's goods to this siding and delivering them there, the practical result of which is that Messrs. Cowan must either arrange to haul them to the siding on payment of tolls or to take delivery of them at the company's public station. The practical question is—have the Commissioners in the circumstances the power to decide that what Messrs. Cowan ask is a reasonable facility under the statute, which the company are bound to grant?

I see no ground for holding that the mere fact that a trader

makes a siding and compels a connection to the company's line under his statutory right, confers upon him the further right of demanding that the company shall deliver to or take up goods for him by their own haulage, and by stopping their trains for that purpose. The siding is not the property of the company, and is not in any sense opened as a station on the line. It is not part of their railway, and Messrs. Cowan could remove it at any time. Lord Stormonth Darling, in his judgment, states that he gives no opinion as to whether the Commissioners could compel a company to deliver goods at a newly-made siding of this description, and that it would be a refusal of reasonable facilities to decline to do so. But it is said that the company have been in the practice of delivering, and that they are continuing to do so as regards certain goods, and that therefore they must continue to do so as regards coal traffic. I am unable to see why, if the railway company have under a special bargain consented to bring goods for a time to that siding, they can be compelled to continue to do so if they do not choose to renew the bargain upon the same or any other terms. The company must convey the trader's goods on their line as long as they work the line, and give facilities at any place which they open and keep open for reception or delivery. That is their duty as carriers and they cannot escape from it. That the company do not dispute, but they maintain that the stations they provide for such purposes are to be provided as may to them seem suitable, and that they can neither be required to open a station at any particular place, nor to keep open a station at any particular place, unless they consider it to be in the interest of the company to do so. These propositions are clearly stated in the cases quoted to us (*Hastings Case* ⁽¹⁾ and *Darlaston Case* ⁽²⁾), and his Lordship does not dispute the soundness of either proposition. But he quotes a passage from Lord Selborne's opinion in the *Hastings Case* to the effect that when the company has in fact opened a station at a particular place, and actually uses it for the purposes of public traffic and invites the public to resort to it for traffic, they are bound by the Act to afford at that station

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(2) *Ante*, Vol. VIII. 216.

1900, 1901. — (to the extent of its powers) all reasonable facilities for receiving, forwarding and delivering, &c. No exception can be taken to that proposition of Lord Selborne, and indeed the source from which it comes gives it the greatest claim to acceptance, but when Lord Stormonth Darling proposes to apply that *dictum* to the present case I confess I am unable to follow him. The company in this case are not carriers to this siding. They have not invited the public to resort to this siding as a station. They are not entitled to use this siding as a station for their own purposes or for receiving or delivering public traffic. They have no right to put anything on to it or take anything off it, unless asked to do so by the private company whose property it is. While they can close any station, they cannot interfere with this siding. Thus their position as regards it cannot be tested by any *dicta* regarding a station which forms part of the railway company's line and to which the public is invited to come, with or for goods. I am therefore quite unable to agree with his Lordship's view that Lord Selborne's opinion in the *Hastings Case* affords any ground for holding that in this case the company can be interfered with, if they decline to stop their trains at a siding which is private property, and which they have neither provided nor used as part of their public system for their traffic.

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As regards the fact that at present they are willing to deliver on a bargain with the Messrs. Cowan certain classes of goods while they decline to deliver others, that does not, I think, make any difference. If they are not under obligation under the reasonable facilities clauses to deliver any goods by their own train service at such a siding, I cannot see that the fact that, under agreement satisfactory to themselves, they undertake certain traffic deliveries for the Messrs. Cowan can be held to place them under obligation to deliver all. If in the interests of their own business they see fit to agree to terms for delivering all or any part, they can do so; I cannot see any reason why they may not, like any other trader, reject what they consider not sufficiently advantageous, and accept what they see fit to accept, unless by statute they are deprived of their liberty in this matter. If, as I hold, they are not bound to deliver goods by their own haulage and servants at that siding, then they can,

I think, only be bound by and to the extent of any bargain they may be willing to make with the trader to whom it belongs.

On these grounds I concur in the judgment which your Lordship proposes.

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LORD YOUNG: Since the year 1872 the traffic of the respondents intended for use at their mill called the "Low Mill," and forwarded on the appellants' railway, has been addressed to them at the "Low Mill" siding, and there delivered by the appellants. The siding was made by the respondents on their property for the purpose of facilitating this delivery, both to the appellants in giving and to the respondents in receiving it, the traffic being of a kind which could be delivered at a siding only. For twenty-eight years it has been used for this purpose and no other. In giving delivery the appellants have during this long period used the siding by hauling (or shunting) on to it trucks containing the traffic so addressed, the respondents in receiving it making the only possible corresponding use of the siding.

On 10th March last (1900) the appellants' manager wrote to the respondents intimating that after 22nd current the respondents "will not accept or carry coal for delivery at your Low Mill siding," and requiring them "to make arrangements to take delivery of your coal at Penicuik station." There has been no proposal to make a change as to the place and mode of delivery of any traffic addressed to the respondents at their Low Mill siding other than coal. The dispute immediately before us thus regards the delivery of coal only, though it seems plain that any legal question must be the same with respect to coal and other traffic.

The appellants' intimation of 10th March was acted on for a brief period, but, with seeming good sense, discontinued on an arrangement that the question of the existence or not of the right claimed by the appellants to make the intimated change against the will of the respondents, and whether their consequent refusal to deliver coal traffic at the siding in question was consistent with their duty and the respondents' corresponding right under the provisions of the Railway and Canal Traffic Regulation Act,

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1854, should be submitted to the Railway and Canal Commissioners, as it was by the proceedings now before us on appeal against the Commissioners' judgment. That judgment is adverse to the appellants, being in substance that the facilities afforded by the appellants for delivering by them and receiving by the respondents of the coal traffic in question from 1872 to 22nd March, 1900, were, according to their powers, &c., reasonable, and there being no reason for a change, ought to be continued.

No dispute seems ever to have arisen as to details—such as the time of delivering at the siding—with respect to days or hours or frequency, or the distance into the siding that trucks should be hauled or shunted, or whether hauling or shunting was most convenient and reasonable. There seems never to have been any conflict between the parties regarding convenience in such matters.

If the Railway and Canal Traffic Act, 1854, is applicable to the respondents' Low Mill siding, the contention of the respondents and the judgment of the Commissioners in their favour seem to me to be obviously right.

There is no suggestion by either party that the siding in question is peculiar or anywise distinguishable from other sidings belonging to manufacturers and traders in every variety of business, who send or receive merchandise or traffic forwarded to or from them by the railways with which they are connected by sidings formed for the purpose of such sending and receiving.

The vast number of such sidings which exist, especially in the vicinity of large towns, and of railway stations (although outside station limits), and their manifest trade importance renders the questions now raised of considerable public interest. All sorts of factories, mills, distilleries, breweries, &c., are attracted to such positions by the facilities there afforded for receiving, forwarding, and delivering traffic upon and from the railways by means of sidings in all respects exactly such as that now in question. Generally the railways have attracted the factories. Here it is (no doubt truly) explained that the factories (the respondents' three mills) attracted the railway

by the prospect of large traffic, for the receiving and delivering of which upon and from the railway a siding convenient to each of the three mills was constructed contemporaneously with the construction of the railway itself.

The contention of the appellants, if I rightly apprehend it, is that they are not bound, and cannot be required to deliver traffic at a private siding, although it may be, and indeed admittedly is, according to their powers to do so and indisputably reasonable that they should. If this is a true proposition there is no answer to their case, and if not, they have, as I think, no case which calls for an answer. The argument used and pressed by their counsel was that if bound to deliver at one private siding they would be equally so at any other and indeed any number of others, and might thus be required to stop their trains every half-mile, or at most ridiculously short intervals of space and time. The answer to this seems to be that the Act of 1854, like the common law applicable to common carriers, requires no more than sweet reasonableness. That it is "according to their powers" to deliver traffic at the respondents' private siding would seem to be indisputable by the appellants, who have been doing so for twenty-eight years as to all the respondents' traffic, and state their intention to continue it as to all except coal. It would not have occurred to me as even stateable that what the appellants did in the past was other than affording according to their powers reasonable facilities to the respondents for receiving delivery of traffic from the railway on the siding constructed by them for its reception and connected with the railway by a junction arranged with the railway company as convenient for the purpose. I have already observed that hitherto there has been no dispute as to details, such as time, frequency, or distance on the siding from the point of junction, and certainly no dispute of that kind is indicated in the proceedings before us. The Commissioners have therefore, in my opinion, rightly assumed that what was so long and uninterruptedly done to the satisfaction of both parties was "reasonable" if nothing was shown or ever suggested to the contrary.

We must determine the legal question submitted to us on the

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footing that what the respondents desire and the Commissioners have ordered is as a matter of fact reasonable. The law which we administer is always applicable to facts, so that any legal dispute cannot be determined by us otherwise than with reference to the facts on which it arises and to which it is to be applied. Now the question of law in dispute before us is, in my opinion, not whether the appellants are bound and so may be compelled to deliver traffic at any private "siding" constructed anywhere by an owner of traffic forwarded by the railway, but only whether they may be required to deliver at a siding in such a place and so constructed that delivery there is according to their power, and a facility for the reception of it by the owner which it is reasonable they should give, or continue to give, as they have in fact been doing to their own profit as carriers for twenty-eight years.

It may be questionable whether a railway company may be required to begin or continue to use a private siding for the "receiving" or "delivering" of traffic of the siding owner upon and from their railway. That question is not before us, and I abstain from indicating an opinion upon it. We must deal with the law in the case before us on the footing that the appellants are now in fact using the private siding in question in the conduct of their business as railway carriers, receiving from the forwarders traffic of a kind of which they have had experience for a quarter of a century addressed to be carried there and there delivered, and carrying and delivering it accordingly as matter of common contract of carriage; that there is no question now before us as to their right to abandon this part of their carrying business, such abandonment never having been proposed; and that the legal question regards only the right, which they claim, to separate coal from the other traffic, and to decline to deliver it as heretofore, and as they continue to deliver the other traffic forwarded by the same trains and so stopped as the other traffic is at this siding. I do not enter upon the reason, or I should rather say the motive, of the appellants for their conduct, which is plain enough upon the statements, correspondence, and evidence before us.

I cannot regard the respondents' traffic forwarded to them on

the appellants' railway by those who supplied it as other than public traffic and carried by the appellants as common carriers. It is private property *in transitu*, as most, if not all, merchandise carried by common carriers is. Passengers are within the statutory definition of "traffic," though usually private individuals, who when travelling by trains or other public conveyances are regarded as common passengers—the travelling public.

The merchandise of which the respondents' traffic consists is sent to the railway by the merchants from whom it is purchased, and it was, I think, stated to us that coals were so sent from the collieries with which the appellants dealt in the coal-master's trucks, in which they were also carried on to the respondents' siding.

When the learned counsel for the respondents called our attention to section 4 of the Railway and Canal Traffic Act, 1894, it appeared to me that it had an intelligible and not unimportant bearing on the argument, showing, as it seemed to me to do, that the Legislature regarded the reception and delivery of merchandise at private sidings ("not belonging to the company") as part of the common and familiar business of railway companies, and for which accordingly it was proper that any legislative provision should be made which experience had shown to be needed or likely to be useful to the railway company and the consignors or consignees of such merchandise. The language of the clauses indicates that disputes had arisen "as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway does not provide station accommodation or perform terminal services," and shows distinctly that the Legislature thought it fitting to give the Railway and Canal Commissioners jurisdiction to hear and determine such disputes. The Railway and Canal Traffic Act, 1854, confers on certain specified Judges jurisdiction to enforce its provisions as to receiving and forwarding of traffic, which jurisdiction is by section 9 of the Act of 1888 transferred to the Railway and Canal Commissioners, and the Act of 1894 (the 4th section of which I have just cited) provides (section 5) that it shall be read with the Act of 1888. Reading section 2 of the Act of 1854, section 9 of the Act of 1888, and section 4 of the Act of 1894, as

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when read together expressing the intention of the Legislature, I am disposed to conclude that the intention was to confer jurisdiction regarding disputes as to any allowance or rebate from rates charged on goods received or delivered "at any siding or branch railway not belonging to the railway company," upon the Railway and Canal Commissioners, as being the tribunal having jurisdiction to determine any dispute as to reasonable facilities for the receiving, forwarding, and delivering of traffic at such sidings or branch railways. I put it no higher than this—that it favours the construction of which I think section 2 of the Act of 1854 admits, and which I certainly prefer, by showing probably, though not certainly, that such was the intention of the Legislature. I may also point out that, in the view that it is absolutely in the power of the railway company to decline to deliver or receive merchandise at a siding not belonging to them, except on their own terms "as to any allowance or rebate" and as to affording or refusing "reasonable facilities for the receiving and forwarding and delivering of traffic" at any such siding, clause 4 of the Act is an absurdity.

Before concluding I desire to call attention to the fact that the Judges of the Second Division were unanimously of opinion that the enactment of section 2 of the Act of 1854, regarding the giving by a railway company of any unreasonable advantage, applied to "receiving, forwarding, and delivering of traffic at any siding or branch railway not belonging to the company," and consequently the Commissioners rightly held that it applied to the private sidings referred to in their judgment. I cannot reconcile that view, in which I concurred, with the notion that the first and leading enactment in the clause has no application to such sidings.

With regard to the cases of *Hastings* ⁽¹⁾ and *Darlaston* ⁽²⁾ I concur in the opinion of the Commissioners that they are inapplicable to the question before us. I think they only decide that the Railway Commissioners have no jurisdiction to order a railway company to construct a station or to re-open or reconstruct a station which they had closed or destroyed.

(1) *Ante*, Vol. III. 464.

(2) *Ante*, Vol. VIII. 216.

LORD ADAM: I have had an opportunity of reading the opinion of the Lord President, and I concur therein.

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LORD KINNEAR: I have found this question to be attended with very considerable difficulty, but on the best consideration I have been able to give to it I have come to the same conclusion as your Lordship in the chair, and for the same reasons. I do not, therefore, think it necessary to repeat what has been already said, but concur in the proposed judgment.

LORD TRAYNER: The first question which we have to decide upon this appeal is whether the applicants are entitled to demand that the respondents shall afford them facilities for receiving, forwarding, and delivering their goods at the Low Mill siding, and whether the Railway Commissioners can order this to be done. In dealing with this question it appears to me to be immaterial, if not irrelevant, to consider that the respondents have for twenty-eight years or more both received and delivered the goods of the applicants at that siding. The respondents in doing so were acting under agreement with the applicants, or if not in execution of an express agreement were acting voluntarily, it was not matter of obligation on the one side or of right on the other. But if the respondents were not bound so to deliver or receive goods, they may cease to do so when they please, and parties must then betake themselves to their respective legal rights. It is equally irrelevant, in my judgment, to urge (as the applicants have done), that the agreement or arrangement heretofore observed is a reasonable one, and that it would be unreasonable to depart from it. I am afraid that neither the Railway Commissioners nor we have any right to order either the applicants or the respondents to be reasonable in their demands respectively; but what the one party is bound to give, and the other party entitled to demand, that we can and must order to be given.

The applicants represent that what they ask an order on the respondents to do is what they are legally bound to do, and may be compelled to do under the provision of the 2nd section of the Act of 1854. In that I think the applicants are wrong; the only facilities for receiving, delivering and forwarding traffic there

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provided for are such as can and must be afforded by a railway company at any station used for the purposes of public traffic, but nowhere else. I regard this as already judicially determined in the *Hastings* and *Darlaston Cases*. Low Mill siding is not a station used for public traffic, it is the private property of the applicants, and used for no traffic but their own, and, therefore, in my opinion, is not a place at which the applicants can insist on having the facilities they ask. If the respondents can be ordered to stop their trains at the Low Mill siding for the purpose of receiving or delivering the goods of the applicants, they may equally be ordered to stop and receive or deliver goods at any and every siding on their line. Under such an order the inconveniences arising in the course of working the railway would, or might, be such as to prevent the fair working of the railway altogether. The ground of my judgment, however, is that the applicants cannot in respect of the provision of the 2nd section of the Act of 1854 demand the facilities here prayed for, and that it is *ultra vires* of the Railway Commissioners to grant their application.

As regards the rest of the order appealed against I think the appeal should be dismissed. If the respondents receive and deliver goods to other traders at their private siding, they must do as much for the applicants, otherwise the respondents would be conferring an undue preference or advantage in favour of those whom they so distinguish to the disadvantage or prejudice of the complainers, and such a proceeding is forbidden by the section of the statute I have already referred to.

LORD MONCREIFF: The order of the Railway Commissioners complained of has two branches:—

First.—They declare that the facilities given by the railway company up to 22nd March, 1900, for delivery of the applicants' coal traffic at the Low Mill siding were reasonable and such as ought to be afforded to the applicants; that since that date the railway company have not afforded due and reasonable facilities for delivery of the coal, and they order and enjoin the railway company to afford such reasonable facilities in the future.

Secondly.—The Commissioners find that the railway company in delivering coal at the sidings of other traders near Penicuik, competitors in trade with the applicants, and refusing to deliver coal at Low Mill siding, have given such traders an undue and unreasonable preference over the applicants, and they order them to desist from giving such traders any such undue and unreasonable preference.

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If the first order is legal, and is obeyed, the second forbidding a preference is of comparatively little importance, because the applicants are, I understand, quite satisfied with the facilities afforded up to 22nd March, 1900. But if it is held that the first order is *ultra vires* of the Commissioners, it will be necessary to consider whether the second order is legal and can stand by itself. If it is legal, the railway company must continue to afford the same facilities to the applicants, unless they are prepared to abandon their present system of delivering goods at all other sidings, and thus the result will be the same as long as the company continues its present system.

Your Lordships are at present only asked to consider the validity of the first order. At the same time, the fact that the company still continues to give such facilities may, as I shall show, have a bearing on the validity of the first order.

What we have to decide is not whether the order of the Commissioners is reasonable—we must assume that it is reasonable if legal—but whether it is within their power to make such an order in any circumstances. But in considering this question of law we are entitled to consider the proved or admitted circumstances in which the application is made, and we are empowered to draw all such inferences as are not inconsistent with the facts, and are necessary for determining the question of law submitted to us. (Railway and Canal Traffic Act of 1888, s. 17 (4).)

The facts are not in dispute. They are simply these. Since the formation of this line in 1872, when this siding was constructed at a cost of 6,000*l.*, the railway company have been in use to deliver at the siding large quantities of coal and other goods, and the same system has been pursued in regard to coal and other commodities consigned to other traders who have

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sidings on the line. Since 22nd March, 1900, however, the railway company have refused to deliver coal at Low Mill siding, and have requested the applicants to take delivery of such coal at Penicuik station. At the same time they continue to deliver other goods at the siding, and they also continue and intend to continue to deliver coal and other commodities as before at the sidings of the other competing traders in the neighbourhood.

It will thus be seen that the history of this line has been that the company's uniform mode of dealing with siding traffic has been to take and give delivery of goods at the private sidings all along the line. But the railway company maintain that, without reason assigned, they are entitled while continuing to deliver as before at other sidings, and even to deliver all other commodities at Low Mill siding, to refuse to deliver coal there. This contention is rested on the construction which the railway company put upon section 2 of the Railway and Canal Traffic Act, 1854, coupled with the definition of the word "railway" in the first section, viz., that the provisions of that section as to the duty of a railway company to afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from their railway is confined entirely to their own line of rails and the public stations thereon, and does not extend to a private siding. They maintain that the trader's right is simply to obtain access from his siding to the company's line, and that the company are not bound to take or give delivery of goods consigned by or to him there, or to deal with it at all except at their public stations.

I am of opinion that this contention, which, as far as I know, is now advanced for the first time, involves too narrow a construction of the clause. The material words of the 2nd section are these: "Every railway company, canal company, and railway and canal company, shall according to their respective powers afford all reasonable facilities *for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively.*" The question is whether traffic brought from or to a railway line is not traffic delivered upon and from a railway in the sense of the statute. I do not think that the

definition of "railway" affects the question. It runs thus: "The word 'railway' shall include every station of and belonging to such railway used for the purposes of public traffic." In the first place the definition does not profess to be exhaustive, and in the second place it may have been thought necessary in the case of a station, because a station might not be considered to be part of the line. I am content to take the argument upon the terms of the second section. The private siding itself is no part of a railway; that was never contended; but the junction of a private siding with the main line cannot be ignored in considering what constitutes traffic delivered upon or from a railway. Siding traffic, that is, traffic taken from or to private sidings, is a distinct and recognised part of a railway company's public traffic (for it is public traffic) which they are bound to forward and deliver upon and from their railway "according to their powers." No doubt it was originally contemplated that the trader should simply have access to the main line and right to use it for his own purposes with his own engines on payment of tolls and subject to bye-laws and regulations. But in practice, and in particular on this line, that mode of disposing of siding traffic (which is open to manifest objections) is not adopted, and the railway company for their own convenience and profit give and take delivery of the trucks at the junctions with the sidings. On the faith of this system much money has been expended on the formation and upkeep of the sidings, which doubtless would not have been incurred if it had been known that the company considered themselves entitled arbitrarily to discontinue the practice. For instance, the upkeep of Low Mill siding costs the applicants 500*l.* a year, its formation cost 6,000*l.* We are now asked to find that it is so entirely within the right of the railway company to deliver or not to deliver goods at private sidings that the Commissioners have no jurisdiction in regard to the regulation of such traffic beyond the limited jurisdiction conferred upon them by the 4th section of the Railway and Canal Traffic Act, 1894, to determine what is a reasonable and just rebate where merchandise is received or delivered by a railway company at any siding, &c., not belonging to the company. I may observe in passing that this is a statutory

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recognition of the existence of the practice, and also that if a railway company could always meet a demand for rebate by a threat to discontinue the traffic the enactment would be comparatively useless.

I am not prepared to adopt that view. Looking to the existing practice of this company on the Penicuik line, and especially to the fact that they still deliver other goods at Low Mill siding, I am of opinion that it is not *ultra vires* of the Commissioners to consider whether the railway company's refusal to deliver coal at this one siding is not in violation or contravention of the 2nd section of the Act of 1854.

I do not think that there is anything in the two cases which were pressed upon us—viz., the *Hastings Case* ⁽¹⁾, and the *Darlaston Case* ⁽²⁾—which necessarily conflicts with the view which I have indicated.

The *Hastings Case* is relied on by the railway company mainly for the sake of Lord Selborne's *dictum*—"With respect to stations there is no obligation to establish them at any particular places or place unless the company thinks fit to do so. The railway as interpreted by the Act *only* includes existing stations used for the purposes of public traffic." I may observe in passing that the word "only" is Lord Selborne's word. It does not appear in the statute. I assume for the purposes of this argument that a railway company is under no obligation to establish a station at any particular place, and, although this is not so clear, that they are entitled without reason assigned to discontinue an existing station if they think fit. But there are passages in Lord Selborne's opinion both before and after the one which I have quoted which applied closely to the present case—"a company may carry, or not, upon its own line as it thinks fit, and if it does so, may undertake that business under various conditions and limitations. But, if and so far as it does undertake so to carry either passengers or goods traffic, it comes (in my opinion) under the obligation to afford for the purposes of that traffic the facilities required by the first branch of the second section of the Act."

Now, assuming that a junction with a siding is to be regarded

(1) *Ante*, Vol. III. 464.

(2) *Ante*, Vol. VIII. 216.

as a station, the railway company have not closed Low Mill siding. They are still delivering other goods there and they are bound to continue to give facilities at it as before, and are not entitled to exclude any particular class of goods.

But, further, private sidings, or rather the junctions of the sidings with the company's line, are not stations belonging to the company which they can open or close at their pleasure, and the only question is in what way shall the traffic which the traders are entitled to give and receive at their sidings be regulated. We are not here dealing with an extreme case. It is not in my opinion necessary to consider what would be the rights of the railway company, or the powers of the Commissioners, if the railway company decided to discontinue in all cases and as to all goods their present system of dealing with siding traffic, or even if a trader proposed to make a new connection with the company's line. We have to deal with the existing state of matters on the Penicuik line. We find that the railway company have been in use since the formation of the line to give and take delivery at all the sidings upon it. These are the facilities which they have been in use to give, and are giving, except in the case of the applicants as to one commodity, and it is in their power to continue to give such facilities. They have deliberately ignored the alternative mode of dealing with siding traffic—viz., letting the traders bring their own engines on to the main line. I therefore think that the Commissioners were called on to deal with an existing practice and existing facilities, and that therefore they had jurisdiction whether those facilities should be continued or not.

In regard to the *Darlaston Case* ⁽¹⁾, it is sufficient to say that although at one time there was a station at Darlaston, it was closed and demolished five years before an application for its restoration was made. The case therefore decides no more than this: That where there is no existing station, and the railway company do not profess at the time of the application to receive passengers or goods at the place where members of the public desire that a station should be placed, it is beyond the jurisdiction of the Commissioners to interfere with the discretion of the

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On these grounds I am of opinion with Lord Young that the first order of the Commissioners was within their powers.

[Solicitors for the applicants : *Menzies, Black and Menzies*,
W.S.]

Solicitors for the railway company : *James Watson*, S.S.C.]

RICHARD

v.

GREAT WESTERN RAILWAY COMPANY (1).

Private Sidings—Right to Communicate with Sidings of Railway Company—Specific Appropriation by Railway Company as Refuge Sidings—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 76—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 81), s. 2.

Section 76 of the Railways Clauses Consolidation Act, 1845, after giving power to owners or occupiers of land adjoining the railway to make private branch railways to communicate with the railway, enacts that—"The company shall, if required, at the expense of such owners and occupiers and other persons . . . make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication, in places where the communication can be made with safety to the public, and without injury to the railway and without inconvenience to the traffic thereon; . . . but this enactment shall be subject to the following restrictions and conditions (that is to say), . . . The company shall not be bound to make any such openings in any place which they shall have set apart for any specific purpose with which such communication would interfere, nor upon any inclined plane or bridge, nor in any tunnel."

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The applicant's sidings had communicated with sidings on the respondents' railway for many years under a terminable agreement, which the railway company terminated; and he now applied under the above-quoted section for an order enjoining the respondents to make, or permit to be made, such lines of rails as might be necessary for effecting a communication between the sidings of the applicant and of the respondents. The railway company refused to make such communication on the ground that their sidings were now set apart for a specific purpose, with which such communication would interfere. At the hearing of the case witnesses on behalf of the railway company proved that the alteration in the contemplated use of the siding was due to an alteration recently made in an adjoining tunnel. This had fallen in, and it had been found necessary to have only a single line of railway for a portion of its length. The consequent alteration in the working of traffic through the tunnel necessitated the exclusive appropriation of the sidings over which the applicant's traffic had formerly been worked to the purpose of providing refuge sidings for trains which met at the tunnel.

Held, that the railway company had shown to the satisfaction of the Court that their sidings had been *bonâ fide* appropriated for the specific purpose of use as refuge sidings, and that the use of them for the applicant's traffic would interfere with such use.

THIS was an application under section 76 of the Railways Clauses Consolidation Act, 1845.

(1) Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

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The applicant, who was a manufacturer of bricks, was the occupier of land adjoining the respondents' lines, on which he had constructed certain sidings, and at a distance of 30 yards from the termination of the same there existed sidings belonging to the respondent railway company, which until recently had been used for the accommodation of the applicant's traffic. The applicant claimed that the construction, at his expense, of a communicating line between these two sets of sidings was a "reasonable facility" within the meaning of section 2 of the Railway and Canal Traffic Act, 1854. The applicant further stated that prior to 1899 he had had other means of access to the respondents' said sidings, but since such date, and owing to the respondents' refusal to permit the proposed communication, he had been unable to forward his brick traffic by the respondents' railway, and had suffered loss and damage in his business in consequence.

The applicant asked, under section 76 of the Railways Clauses Consolidation Act, 1845 (which was incorporated in the special Act of the respondent railway company), and under section 2 of the Railway and Canal Traffic Act, 1854, and section 12 of the Railway and Canal Traffic Act, 1888, for an order enjoining the respondents to make or to permit to be made such lines of rails as might be necessary for effecting a communication between the sidings of the applicant and of the respondents, and for 500*l.* damages.

The respondents denied that the applicant was entitled to have such communication, on the ground that it could not be made (in the words of the section) "with safety to the public" and "without inconvenience to the traffic" on the railway, and further because they had set the place apart for "a specific purpose, with which such communication would interfere."

The facts proved were as follows:—

Cockett station, to the west of which the sidings in question were situated, was on the main line of the Great Western railway to Milford, with about 165 trains passing through *per diem*. The station was built on a small level piece of line of about 170 yards—the gradient on the west, which extended for about 3 miles, being as much as 1 in 50, and that on the east

starting at 1 in 71 and falling to 1 in 52, and extending for about 2 miles; while at the east side of the station there was a tunnel, which, owing to a recent fall in the roof, could only be worked in future as a single line. In order to cope with the difficulty of having only a single instead of a double line in the tunnel, the railway company were compelled to create two sets of refuge sidings, one at each end of the tunnel; and at the west end they had to turn their sidings at Cockett station into two such refuge sidings (with which the applicant now asked to be connected). Both the up and down lines would be blocked while the applicant's up traffic was being manipulated.

C. A. Russell, Q.C. (Waghorn with him) for the applicant.

If the connection were made, the power of control would be entirely in the railway company's hands; about two trains *per diem* would be ample for the applicant's purpose; and the sidings could be used at all other times as refuge sidings. The fact that they are intended as refuge sidings does not prevent their being considered sidings for any siding purposes, and does not amount to appropriation. It is obvious the applicant would never have taken the brickworks, if he had not expected to always have the railway communication.

Asquith, Q.C. (Ernest Moon with him), for the railway company.

If the applicant once makes out his statutory right to the connection, it is impossible for the Court to limit his user of it. There has been a *bonâ fide* appropriation by the railway company, which is all that is necessary; and the applicant's traffic would be a substantial interference with the very purpose for which this appropriation was made.

The judgment of the Court was delivered by

WRIGHT, J. : The question which we have to decide arises under the 76th section of the Railways Clauses Act, 1845. It was suggested, but not pressed, that the relief which the applicant desires could alternatively be given as a due facility under the Traffic Act of 1854. We think, however, that in the first instance we have only to consider the Railways Clauses Act,

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which (as construed many years ago) merely recognises or saves a legal right, subject to certain exceptions of law or fact. If the applicant establishes under the Railways Clauses Act his legal right to a physical junction, then the use of it can be protected, enforced, or regulated under the Traffic Act, but no one has ever supposed that under the Traffic Acts alone we can under any ordinary circumstances order a railway company to permit a junction, much less to lay down sidings. The Railways Clauses Act, s. 76, provides, subject to the provisions of certain Acts, that a company shall, if required, at the expense of owners and occupiers of lands adjoining the railway, and other persons, "make openings in the rails, and such additional lines of rail, as may be necessary for effecting such communication, in places where the communication can be made with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon, . . . but this enactment shall be subject to the following restrictions and conditions (that is to say), . . . The company shall not be bound to make any such opening in any place which they shall have set apart for any specific purpose with which such communication would interfere . . . "

The first class of exceptions to the right (as, for instance, "where the communication can be made with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon") probably refers to what may be called engineering difficulties, difficulties of any kind which may render the mere making of a junction objectionable in itself, apart from the use which may be afterwards made of it, the effects of which subsequent use cannot be foreseen at first, and therefore could not always be regarded as an objection to the allowance of the claim.

The second class of exceptions is directed to particular specified difficulties; the only one of which that is material in this case is that which is set forth in the words, "the company shall not be bound to make any such openings in any place which they shall have set apart for any specific purpose with which such communication would interfere."

In considering a question of this kind, the first thing to bear in mind is that the Courts have always attached great weight to

the views of the superior managers and engineers of the railway expressed in good faith, and under a due sense of responsibility. In this case we are satisfied upon evidence of this kind ; first, that the sidings in question were designed and appropriated in good faith for the specific purpose of use as refuge sidings ; and next, that the use of them for the applicant's traffic would be substantially prejudicial to the use of them as refuge sidings, or, in the words of the Act, would "interfere" with such use. Under the peculiar circumstances of the configuration of the locality, with its severe inclines in both directions, the reduction of the railway to a single line, consequent on the collapse of the tunnel, and the great and increasing volume of the traffic, ordinary and special, of a main railroad over this neck of single line, we are satisfied that in reserving to themselves the exclusive use of these sidings the railway authorities are acting with no more than reasonable prudence.

It is not enough under section 76 for the applicant to show that his traffic could be accommodated. If his right is admitted at all, it must extend to the whole of his traffic, however extensive it may become, and the railway company could only claim to regulate, not to exclude it, and if it cannot be excluded we think it proved that the admission of it must interfere with the use of the sidings for their specific purpose.

The result is unfortunate for the applicant, but the railway company must be supposed to have made at the time of the acquisition of the land for their railway such compensation, if any, as the law gives for the damage suffered by the adjoining lands. Nor does it appear that the occupiers of the adjoining lands are in any respect in a worse position than that in which they would have been if the railway had never been made.

We are confirmed in our view as to the *bona fides* of the railway company by this, that they have not in the past shown any unwillingness to give to the applicant facilities for the reception and dispatch of his traffic, and that the value to them of his traffic would be very considerable.

[Solicitors for the applicant : *Pontifex, Hewitt, and Pitt.*

Solicitor for the railway company : *R. R. Nelson.*]

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Wright, J.

LANCASHIRE BRICK AND TERRA COTTA COMPANY
(BAXENDEN), LIMITED,

v.

LANCASHIRE AND YORKSHIRE RAILWAY COMPANY ⁽¹⁾.

*Adjoining Owner—Private Branch Railway—Openings for Communication
with Railway—Obligation to Make—Jurisdiction of Railway Commis-
sioners—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 76.*

December 5,
1901.
February 17,
1902.

Section 76 of the Railways Clauses Consolidation Act, 1845, gives power to owners or occupiers of lands adjoining the railway to lay down "any collateral branches of railway to communicate with the railway, for the purpose of bringing carriages to or from or upon the railway," and further enacts that "the company shall, if required, at the expense of such owners and occupiers . . . make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication, in places where the communication can be made with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon." The enactment is subject to certain restrictions, one of which is that the railway company shall not be bound to make any such openings upon an "inclined plane."

Held, by the Railway Commissioners, that siding owners have, by this section, an absolute right to call upon railway companies to make necessary openings in their rails for effecting communication between sidings and the line of railway, unless one of the statutory objections mentioned in the section apply, and, therefore, the refusal of a railway company to make such connection, except upon the terms of a special agreement to be entered into on the part of the siding owner, is a contravention of the section.

Held, also, by the Railway Commissioners, that a siding having a gradient of 1 in 96 or 98 is not upon an "inclined plane" within the meaning of the section, which means a plane so inclined as to be incompatible with the reasonable insertion of a junction.

Semble, by the Railway Commissioners, that the words in the section "with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon," refer to difficulties depending on engineering considerations which can be proved to exist at the time of making the connection, and not to difficulties which may become existent by reason of the volume of traffic afterwards.

Held, by the Court of Appeal (reversing the decision of the Railway Commissioners), that the right given by section 76 of the Railways Clauses Consolidation Act, 1845, to the owner or occupier of land adjoining a railway to lay down collateral branches of railway and to require the railway company

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBBAM, sitting at the Royal Courts of Justice, London.

to make openings in their rails, and such additional lines of rails as may be necessary for effecting communication, is not an absolute right, but only a right to require a connection to be made for the purpose of the use of the railway by the adjoining owner with his own engines and carriages, and, therefore, that an adjoining owner who makes a siding is not entitled to demand communication with the railway for the purpose of establishing a claim to facilities for his traffic.

Held, also, by the Court of Appeal, that the words "with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon," do not relate solely to the structural difficulties of making an opening, but refer also to difficulties arising from working the traffic on the railway.

THIS was an application under section 76 of the Railways Clauses Consolidation Act, 1845.

The application was in the following terms :—

"1. The applicants manufacture bricks at Baxenden, in Lancashire, on land which adjoins the respondents' railway. They have laid down on their said land collateral branches of railway or sidings which communicate with the said railway by additional lines of rail laid on the respondents' land.

2. Their said sidings and the said additional lines were laid down at the cost of the applicants in pursuance of an agreement in writing made between the applicants and the respondents and dated the 27th of September, 1894.

3. By the said agreement it was provided (*inter alia*) that the applicants or the respondents might at any time after the expiration of five years from the date thereof on giving six calendar months' notice in writing determine the agreement and that thereupon so much of the said lines of rail as were on the respondents' land should be removed.

4. The applicants by reason, and on the faith, of the facilities afforded by their said siding and connection, have developed a large business which cannot be carried on without such facilities.

5. On or about the 16th of June, 1900, the respondents gave to the applicants notice in writing to determine the agreement at the expiration of six calendar months therefrom.

6. Negotiations thereupon took place between the applicants and respondents with reference to the terms upon which the siding should be used after the expiration of the said notice, and the applicants claimed (*inter alia*) to be entitled to have so much of the said siding or branch railways as are upon the applicants'

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land connected with the railway of the respondents under section 76 of the Railways Clauses Consolidation Act, 1845.

7. By letter dated July 2nd, 1901, the respondents gave to the applicants notice that they intended in 14 days from the date of such notice "to sever the connection" between the applicants' siding and the respondents' railway and "to remove the rails, points, &c." from off the respondents' premises.

8. By letter dated July 5th, 1901, the applicants gave to the respondents notice in the following terms:—

'It only remains for us to give you notice by virtue of section 76 of the Railways Clauses Act, 1845 (as we do hereby) that we require a communication from our private siding to your company's rails. As the present connection is safe as regards the public, without injury to the railway, and without inconvenience to the traffic thereon, we submit that to sever it would cause needless inconvenience and expense, so that, if you deny our right to the connection, we will on hearing from you to that effect at once take the necessary steps to test the question, and will ask you pending the decision to allow the physical communication to remain as it is.'

9. Notwithstanding the proposal of the applicants that the siding should not be severed pending a decision as to the legal rights of the parties, the respondents on the 16th July, 1901, began to remove and are now removing the lines on their land which have afforded communication between the said sidings and the respondents' railway; and the respondents are refusing to afford to the applicants reasonable facilities for the receiving, forwarding and delivering of traffic upon their railway to and from the applicants' said siding. The applicants are thereby deprived of the benefit of their said siding, and their said business is being very seriously damaged.

10. The respondents, by refusing to afford such communication with their railway as aforesaid, have contravened the provision of section 76 of the Railways Clauses Consolidation Act, 1845.

The applicants apply to the Court of the Railway and Canal Commission under the above Acts, and in particular under

section 2 of the Railway and Canal Traffic Act, 1854, sections 9 and 12 of the Railway and Canal Traffic Act, 1888, and section 76 of the Railways Clauses Consolidation Act, 1845, for

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1. An order enjoining the respondents to renew the communication between the applicants' sidings and the respondents' railway as the same was heretofore used and enjoyed, or otherwise to make such openings in their lines of rails and lay down such additional lines of rails as may be necessary to effect communication between the said sidings and their said railway.
2. An order enjoining the respondents according to their powers to afford to the applicants all reasonable facilities for the receiving, forwarding and delivering of their traffic over the respondents' railway from and to the applicants' said siding.

3. 750*l.* damages."

The answer of the railway company was as follows :—

"1. The respondents do not admit paragraph 4 of the application.

2. The point at which the applicants have requested the respondents to make openings in their line of railway in order to make a communication with sidings upon the applicants' land is on an inclined plane, the gradient of which is 1 in 96, and the respondents cannot be required to make the openings which the applicants have required them to make.

3. The communication which the applicants require to be made between the sidings upon the applicants' land and the respondents' railway cannot be made for the purposes for which the applicants are entitled to require it to be made under section 76 of the Railways Clauses Act, 1845, with safety to the public or without injury to the railway or without inconvenience to the traffic thereon. The railway of the respondents at the point at which it is proposed that the communication should be made is a railway over which a large volume of traffic passes, and any user by the applicants of the communication between their sidings and the respondents' railway for the purpose of bringing carriages to, from, or upon the railway, which is the only purpose for which the applicants are entitled

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to have the proposed communication made, would be dangerous to the public, and would seriously inconvenience the traffic on using that portion of the respondents' railway.

4. The applicants claim and intend that the proposed communication with the respondents' railway may and shall be used not only for the purpose of the applicants' traffic, but also for the purpose of the traffic of any other company or person whom they may permit to use the siding or their own land. The applicants further claim that the respondents will be bound to receive, forward, and deliver at, to, or from the said siding by means of the said communication the traffic of any such other company or person as well as the traffic of the applicants. The user of the said communication by such other companies or persons would be dangerous to the public, injurious to the railway, and inconvenient to the traffic thereon, and the respondents could not with safety to the public, or without injury to the railway, or inconvenience to the traffic thereon, receive, forward, and deliver at, from, or to the said siding by means of the said communication the traffic of such other companies or persons as well as the traffic of the applicants.

5. The respondents in removing the lines forming the connection between their railway and the applicants' siding were acting under the provisions of the agreement referred to in the application. The respondents are and always have been willing to renew the said agreement upon the same terms if the applicants would agree to restrict the user of the connecting lines therein referred to to their own traffic.

6. The applicants, by agreeing to the terms set forth in the said agreement, have waived any rights which they might otherwise have had to require the respondents to make the proposed communication."

Balfour Browne, K.C., and R. Whitehead, for the applicants.

The question is whether, when a railway company have been requested under section 76 of the Railways Clauses Act, 1845, to make openings in their line for the connection of sidings, they are entitled to decline to do so. The applicants are entitled to have the connection made with the respondents' line as a matter

of right. The applicants are not bound to restrict the user of their siding to their own traffic. The siding is not an inclined plane within the meaning of the section.

C. A. Russell, K.C. (Ernest Moon with him), for the defendants.

The only right given by section 76 is a right to the trader to use the connection for the purpose of running himself his own traffic in and out. It is not merely the making the opening, but the user which must not cause danger to the public. The right claimed by the applicants does not exist where a communication cannot be made with safety to the public. The siding is an inclined plane within the meaning of the section. The railway company are prepared to enter into the ordinary siding agreement, and to deal with the traffic of the applicants and of one particular tenant.

Evidence was called by the railway company that loads had to be reduced on an up gradient of 1 in 98. It was admitted in cross-examination that the railway company had sidings upon gradients of 1 in 100, with a connection of the kind asked for by the applicants, which were worked without serious danger or inconvenience as long as proper precautions were taken. The railway company also gave evidence to show that they could not without difficulty or inconvenience deal with the traffic of a large number of persons at the applicants' siding.

WRIGHT, J. : Treating this application for the present as we must treat it, as an application under section 76 alone, we think that the applicants are clearly entitled to have such a connection made as that which they propose. No modifications of detail have been suggested by the railway company. The railway company have objected on three grounds : first, that it is an inclined plane ; second, that if used as the applicants intend, or propose, or claim the right to use it, the siding will interfere too seriously with their own traffic. We must first deal with these two grounds. As regards even an inclined plane, I have a strong impression, which I think the rest of the Court shares,

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that if the matter were inquired into historically, as it might be, with the view of discovering what was the meaning of the term "inclined plane" in the Railways Clauses Act, the result would be that we should obtain from the engineering witnesses who are alive now, that an inclined plane meant an inclined plane worked in a different way from ordinary sections of a railway which are worked by common locomotives. However that may be, we do not think that this incline of 1 in 96, or 1 in 98, as it is now stated to be, can be an inclined plane within the meaning of the section. The section cannot possibly be understood as meaning that every mathematically inclined plane must be an impossible site for a siding. It must be so inclined as to be incompatible with the reasonable insertion of a junction of this sort. The evidence here is that there are sidings, with a connection of this kind, at a considerable number of places on a gradient not materially worse than this, and that although such a gradient may require special precautions for the safe working of the traffic, no danger is found if these precautions are taken.

On the second point, I do not think the question really arises on this section whether the applicants can or cannot carry traffic of persons other than themselves. If they have a right to carry the traffic of those other persons, it seems to me that, according to the doctrine laid down in *Hughes v. Chester and Holyhead Railway Company* ⁽¹⁾, the applicants have an absolute right to have a connection made, unless one of the statutory objections mentioned in the section would apply.

The third ground is based on the words "in places where the communication can be made with safety to the public and without injury to the railway, and without inconvenience to the traffic thereon." We have already, in the case of *Richards v. Great Western Railway Company* ⁽²⁾, gone some way towards expressing an opinion that those words probably refer to what may be broadly described as a difficulty on engineering considerations. They probably refer to difficulties which can be proved as existing at the time when the question arises, and the time when the connection is made, and not to difficulties which, although

⁽¹⁾ 31 L. J. Ch. 97.

⁽²⁾ *Ante*, p. 133.

non-existent then, may become existent by reason of the volume of traffic afterwards. We see no reason to take a different view now; but, in any case, I do not think it is proved that, in any reasonable view of the meaning of the section, there is such inconvenience to the traffic as ought to be taken into consideration here. It must be borne in mind that this is a passenger line, as I understand, and the Board of Trade will not pass these openings and allow the points to be used unless their inspector be satisfied that they can be used without danger to the public.

It seems to me here that the applicants are entitled to have this connection made, apart from any question as to the mode of dealing with it. These are questions we cannot deal with at present. It may be that the railway company will find that there is no occasion to raise these questions. If they are raised they can easily be put into shape for determination.

It must be clearly understood that we should probably see great danger to the traffic if the sidings are to be run over by the siding owners. It is quite out of the question for this Court at this time of day to make any order, unless it is absolutely compelled to, which would have the effect of allowing siding owners to run over these lines. Running powers would be most dangerous in every respect in the hands of irresponsible persons.

The railway company appealed.

C. A. Russell, K.C., and *Ernest Moon*, for the railway company.

If the decision appealed from is right, any one who has land adjoining a railway can, by laying down a siding, acquire a right to a connection with the railway, and a right of user over the railway. The purpose contemplated by the statute is the use of the railway by an adjoining owner with his own engines and carriages. Section 92 of the Act of 1845 gave a general right of user over a railway, and section 76 introduces certain limitations of the user. The Court of Session in Scotland has held under the corresponding section (69) in the *Railways Clauses Consolidation Act, 1845*, in the case of *Cowan and Sons v. North*

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Foote, K.C., and *R. Whitehead*, for the applicants.

Sections 92 and 76 of the Railways Clauses Act, 1845, have not been repealed. It may have been contemplated when that Act was passed that the trader would carry his own traffic over the railway, but that does not disentitle him from requiring the connection to be made so that he can afterwards apply for reasonable facilities for the carriage of his traffic. Section 76 speaks of communication with the railway "for the purpose of bringing carriages to or from or upon the railway," and says nothing as to carriages running on the railway, and the present application is confined to communication for the former purpose. If siding communication can only be obtained by agreement, many of the provisions of the Railway and Canal Traffic Acts will become useless, such as siding rebates under section 4 of the Railway and Canal Traffic Act, 1894. Section 9 of the Railway and Canal Traffic Act, 1888, and section 14 of the Regulation of Railways Act, 1873, give the Commissioners jurisdiction in matters relating to private sidings. The provisions of section 76 as to the making of openings, on the ground of safety to the public, injury to the railway, or inconvenience to the traffic thereon, prevent an unreasonable use being made of the section.

COLLINS, M.R.: This case arises in this way: The applicants had an agreement with the railway company made on

⁽¹⁾ *Ante*, 96.

⁽²⁾ 31 L. J. Ch. 97.

the 27th September, 1894, whereby the applicants acquired the right to have their goods received and sent from a siding by the respondents' line. That agreement contained a clause by which it was determinable on six months' notice at the end of five years. The land owned by the applicants upon which they had made the siding consisted of some 38 acres. After they had been established for some time with their works, they let a part of the land to other parties who set up chemical works upon it. The respondents, although they were willing to give facilities for the traffic of the applicants themselves, and also for that of the chemical works, were not minded to give facilities for any further works that might be built on the applicants' land. They therefore gave notice to determine the agreement, and for the present purpose it must be taken that the connection between the siding and the respondents' line has been taken up, the applicants being unwilling to continue the agreement on the terms which were offered. Thereupon arises the question before us, whether under section 76 of the Railways Clauses Consolidation Act, 1845, the respondents can be forced to make an opening from their line to the applicants' siding. That is the only question before us, because, though on the hearing in the Court below, the application was based on wider grounds, this single point as to whether the applicant had this absolute right under section 76 of the Act was the only one discussed and decided.

The side-note to the section fairly expresses the substance of it. It is "Power to parties to make private branch railways communicating with the railway." By the section it is enacted that "this or the special Act shall not prevent the owners or occupiers of lands adjoining the railway, or any other persons, from laying down, either upon their own lands or upon the lands of other persons, with the consent of such persons, any collateral branches of railway to communicate with the railway, for the purpose of bringing carriages to or from or upon the railway." The section then provides that the railway company, subject to the provisions of the Railway Regulation Act, 1842, shall "make openings in the rails, and such additional lines of rails as may be necessary for effecting such communication, in places where the communication can be made with safety to the public,

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and without injury to the railway and without inconvenience to the traffic thereon." Then follows the provision that "the company shall not be bound to make any such openings in any place which they shall have set apart for any specific purpose with which such communication would interfere, nor upon any inclined plane or bridge, nor in any tunnel;" and, further, that persons making or using such branch railways shall be subject to the bye-laws and regulations of the company. Now it is admitted as a fact that to allow this section to be carried out in its entirety—that is to say, to allow the applicants to have access for the purpose of working their own carriages and wagons on the respondents' line, could not be done with safety to the public and without injury to the railway, and without inconvenience to the traffic thereon. That was clearly expressed by Mr. Justice Wright, who said that it would be out of the question nowadays to suppose that any such thing could be allowed to be carried out upon a public railway working under modern conditions. Therefore I take that as established as a fact, and in view of that fact the question arises whether the applicants have a right to demand that the railway company shall submit to the making of an opening on their line. I am of opinion that they have not. I think it would be straining the Act of Parliament beyond both its words and its spirit if we were to give to the applicants in this case the right to force an opening to the line, not for the purpose laid down in the Act, or anything like it, but simply to give them a *locus standi*, through having effected the passage into the line, to come afterwards and ask for reasonable facilities at that point for the receipt and delivery of their traffic. It was quite obvious that the section was passed at a time when, following upon other sections passed from the same standpoint, a railway was looked upon merely as a particular form of highway on which all people who had the means of travelling along that particular line of railway should have the right to do so, and accordingly the section gives to persons owning land adjoining the railway facilities to get access to it—not access by way of forming a station at that particular point, but access for the purpose of transit. What is now asked is, not that there should be facilities

for transit, as contemplated by this section, but that there should be a place, which might be regarded as a station, for the purpose of insisting that it was such a point on the railway that members of the public had a right to come and demand reasonable facilities for receiving and delivering and forwarding of traffic at that place. We have only to look at the legislation of which the section is a part, and to look at the section itself, to see that that is in no sense the object of this particular section. It was, what it purports to be, simply a section empowering persons who wanted to run branch lines into the railway to have access to the railway for the purpose of conveying their own traffic over the branch line on to the railway and *vice versa*. That being so, it seems to me to dispose of the case. Whether or not these particular traders have any other remedy, either under the general power of getting facilities under the Traffic Act, or under the undue preference clauses, it is not necessary to consider. The question has been discussed in a Scotch case, *Cowan and Sons v. North British Railway Company* ⁽¹⁾, on both points, and the Judges, as I understand, held that there is no jurisdiction in the Court to give to a trader the right to demand access to a line at a particular point where it does not exist; and also that where the access had existed before under an agreement, and that agreement is determined, there is no jurisdiction to do more than if there had never been any agreement at all. Whether or not that view would prevail if the matter were argued before us, I desire to keep a perfectly open question. I give no opinion upon that matter, but for the purpose of deciding this case it seems to me, on the short grounds I have put, that section 76 cannot be used simply to make an occasion for demanding facilities under the other Acts. I do not think this case is brought within the section, and for that reason I think this appeal must be allowed.

ROMER, L.J.: I am of the same opinion. I doubt very much whether it can be said here that the applicants have laid down a collateral branch of railway for the purpose of bringing carriages to or from or upon the railway within the meaning of

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those words as used in the 76th section. But passing that by, it appears to me that the argument used on behalf of the applicants as to the limitation of the right of communication contained in section 76 is not well founded. The limitation is this—the opening can only be made in places where the communication can be made with safety to the public, without injury to the railway, and without inconvenience to the traffic thereon. It is said that that is limited to the consideration of the difficulty of structural communication only. That is to say, we have only to see whether the openings in the rails and the communications with the rails of the additional line that the railway company has to make, can be effected structurally with safety to the railway company's own traffic, or the traffic to come on to it from the branch railway. In my opinion, that cannot be so. The communication is to be used for the purpose of bringing carriages to or from or upon the railway, and where, in the phrase with which I am now dealing, we find a provision as to places where the communication can be made with safety to the public and so forth, it means the communication previously referred to—that is, a communication by means of which carriages can be brought on to the railway; and it appears to me that it would be an extremely narrow and untrue construction of this section to say that we have not to bear in mind, in considering whether the communication could be made with safety to the public and without injury to the railway and without inconvenience to the public, the possibility of injury and inconvenience arising from the passing of the carriages over the branch railway on to the main railway. It appears to me that that is a thing which must be taken into consideration. Therefore we have to inquire, is this a place where such communication ought to be allowed—a communication which presumes the right on behalf of the persons using it to bring their own carriages, if they think fit to do so, on to the railway? In other words, the right which is given by the section contemplates an entirely different state of things from that which we have before us. Dealing with this section on that basis, it appears to me that we can only answer the question which I have considered, in one way—by saying that the communication

cannot be made without the injury and inconvenience that is referred to in this section. It appears to me that when in the Court below they came to that conclusion of fact the application of the section ceased. I agree therefore that the appeal should be allowed.

MATHEW, L.J. : I am of the same opinion. The argument in favour of the trader, pushed to its legitimate results, would lead to very formidable consequences. As I understand, the argument comes to this—that anybody choosing to make a siding to a railway may call upon the railway company to make a communication and to afford facilities for the purpose. Is that the law? Let me deal with this particular case. The arrangements between the trader and the company had their origin in an agreement—in a determinable agreement—and the trader had no right whatever to approach the railway at that point except under the specific agreement. It seems to me to be impossible to convert that agreement, terminable and since put an end to, into something that creates a permanent obligation on the railway company. It is said that this is effected by section 76. The purpose contemplated by the section was the use of the railway by the trader with his own rolling stock. That was a view upon which a good deal of the earlier legislation with reference to railway companies proceeded. The final clause of section 76 makes it perfectly clear what is meant. It provides that persons making or using the branch railways shall be subject to all bye-laws and regulations of the company from time to time made, with respect to the passing upon or crossing the railway or otherwise. It is clear from this that what was contemplated was the use of the railway by the trader. That has no application to this particular case, and I agree that the appeal must be allowed.

[Solicitors for the applicants : *Neish, Howell, and Macfarlane*, for *B. T. Westwell*, Accrington.]

Solicitors for the railway company : *Woodcock, Ryland, and Parker*, for *C. Moorhouse*, Manchester.]

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Charges for Conveyance of Timber—Measurement of Timber—Most Accurate Mode—Railway Rates and Charges Order Confirmation Act, 1891, section 18 of the Schedule—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 10.

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By section 18 of the Schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, it is enacted that "the cubic contents of timber consigned by measurement weight shall be ascertained by the most accurate mode of measurement in use for the time being."

Held, that the most accurate mode of measurement in use, of the cubic contents of round timber consigned by measurement weight, is measurement by string under bark, with a divisor of 113, with reasonable allowances for any irregularity or defect in the shape of the timber measured.

The Court did not determine the question whether the railway company were entitled to make any charge in respect of the carriage of bark excluded from the measurement of timber as above provided.

THIS was an application under section 10 of the Railway and Canal Traffic Act, 1888.

The application stated that the respondent was a timber merchant who had consigned round timber by the applicants' railway to various destinations since January, 1893, and that a dispute had arisen between the applicants and respondent as to the legality of the charges which the applicants made for its carriage. That by the schedule annexed to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, it was provided as follows:—

"Section 16.—Weight (except as to stone and timber when charged by measurement) shall be determined according to the imperial avoirdupois weight."

"Section 18.—When timber is consigned by measurement weight, 40 cubic feet of oak, mahogany, teak, beech, greenheart, ash, elm, hickory, ironwood, baywood, or other heavy timber,

(¹) Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

and 50 cubic feet of poplar, larch, fir, or other light timber other than deals, battens, and boards, may be charged for as one ton, and smaller quantities may be charged for in the like proportion. The cubic contents of timber consigned by measurement weight shall be ascertained by the most accurate mode of measurement in use for the time being."

The applicants alleged that the most accurate mode of measurement in use was either—(a) the girth of the tree being ascertained by tape over bark and the quarter-girth being taken to a quarter of an inch, the quarter-girth in inches is multiplied by itself and the result is multiplied by the length of the tree taken by tape or rule to the half-foot. The total of contents so ascertained is divided by 113 to give the number of cubic feet in the tree. Or (β) the diameter of the tree, being ascertained by the calliper in inches, is multiplied by itself and the result is multiplied by the length of the tree, ascertained in the same way as described in (a). The total of contents so ascertained is divided by 113 to give the number of cubic feet in the tree. The results of these two modes of measurement were alleged to be the same, and the cubic feet of contents so ascertained not to exceed the actual cubic feet in the tree. In 1893, when the provisions of the Act came into force, the railway companies adopted the method (β), but later an arrangement between the Timber Trade Federation and the applicants was adopted, by which the divisor was altered from 113 to 144, thus diminishing the calculated contents of the tree. The applicants asked for an order declaring that they were entitled to use either of the modes of measurement (a) or (β) to ascertain the cubic contents of timber carried for the respondents at measurement weight.

The respondent, in his answer, denied that the results of the two methods of measurement advocated by the applicants were the same, and contended that the contents as ascertained by either of them exceeded the actual cubic feet in the tree. He asserted that the most accurate mode of measurement in use was known as "string measurement," which had always been the mode of measurement in use in the timber trade, and was

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as follows :—"String (or pack thread) is drawn tight round the tree. It is then doubled twice and measured (so doubled) along a rule. A deduction is made for bark on the trunk of half an inch in the case of trees less than 12 inches in entire girth, and 1 inch per foot in larger trees. The remainder is the quarter-girth. This is then multiplied by itself and then by the length of the tree and divided by 144, as in the case of the quarter-girth ascertained by tape measurement." The respondent maintained that the charges of the applicants for the carriage of round timber ought to be based upon string measurement.

Cripps, K.C., Asquith, K.C., and Ernest Moon appeared for the Great Western railway company.

Balfour Browne, K.C., and Whitehead, for the respondent.

WRIGHT, J.: This is not a case in which it is desirable to give too many reasons, because the problem that we have to solve is in truth unsolvable if we try to follow out the language of the Act or Provisional Order that we have to deal with. We must deal with it as well as we can. It is clear that there are several modes of measurement which may be said to be "in use for the time being." There is the mode adopted in the docks both as regards freights and all other purposes for which timber is received into the docks, which is, generally speaking, at any rate in the London docks, tape under bark with a divisor of 118, and careful allowance by skilled persons in cases of irregularity in the shape of the tree. Another method adopted at the same docks, adopted not as a practice, but whenever requested, and which, therefore, may be said to be "in use," is the same as the other, only string under bark, with the same divisor and the same regard to allowances. In special cases another mode is the mode in use in the English timber trade, and that evidently is, according to the respondent's witnesses, string under bark and 144 divisor. I doubt whether any other system has been shown to be actually in use and to have any approximation to accuracy. I do not think tape or string over bark or the callipers can be said to be in competition with the

other systems as far as accuracy is concerned. Practically, therefore, we have to choose between the dock and freight system and the timber trade system as regards the method of measurement, the dock system being the tape under the bark, the timber trade system being string under the bark. I think we are all agreed, as indeed the railway company seems now to admit, that to be the more accurate.

As between the divisors, the 113 in use in the docks and 144 in use in the timber trade, I cannot entertain, speaking for myself, any doubt that the 113 is the one which most nearly approximates to the real measurement weight of the timber, and when the section uses these words: "The cubic contents of timber consigned by measurement weight shall be ascertained by the most accurate mode of measurement in use for the time being," it must be a divisor which, all things being considered, gives the nearest approximation to the actual measurement weight of the timber.

I think, on the whole, the proper order is that which Mr. Cripps himself suggests, namely, the string under bark with a divisor of 113 and reasonable allowances. I should be inclined to say that it ought to be added that we have power to add that string over bark may be adopted if a proper allowance is made for bark. That seems to be the system sufficiently in use to make it a proper part of the order.

SIR FREDERICK PEEL and LORD COBHAM concurred.

The form of the order subsequently came before the Court, when the Court allowed the following recital to be inserted: "And whereas the Court was not required to determine the question whether the Great Western railway company was entitled to make any charge in respect of the carriage of bark excluded from the measurement of timber as hereinafter provided."

[Solicitor for the Great Western railway company: *R. R. Nelson*.

Solicitors for the respondent: *Field, Roscoe & Co.*, agents for *Pinsent & Co.*, Birmingham.]

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*Increase of Rates—Justification of Increase—Measure of Reasonableness—
Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1—Rates
for Small Parcels—Entry in the Rate Book of Station to Station Rates—
Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 14.*

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March 1, 2, 3,
6, 8.

May 18.

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In justifying an increase of rates under section 1 of the Railway and Canal Traffic Act, 1894, it is not sufficient to show an increase in the ratio of cost to receipts to an extent equalling or exceeding that of the advance in the rates. If it be shown, after all elements of cost and economy have been taken into consideration, that the necessary cost per ton carried will, under uniform conditions, be increased by any sum without any compensating circumstances, then it is *prima facie* reasonable to increase the charge by the same sum.

In considering under this section whether an increase of rate is reasonable, the Court is not precluded from having regard to any circumstances which may tend either to justify the increase or to prove it unreasonable.

Although the rates, as existing before 1893, are presumed by the Railway and Canal Traffic Act, 1894, to be sufficiently high, an advance shown to be necessary to accommodate them to circumstances may be allowed, even though the circumstances are of a date prior to 1893 (*e.g.*, circumstances existing since 1888), provided that the date is not too remote.

Upon a complaint by Manchester oil refiners under section 1 of the Railway and Canal Traffic Act, 1894, that the London and North-Western and other railway companies had, in March, 1893, directly and unreasonably increased certain rates per ton in force on December 31st, 1892, to the extent of some 5 per cent.,

Held, that the railway companies having shown that the cost of goods traffic had grown proportionately between 1888 and 1892, an advance of rates in 1893 to the extent of 3 per cent. was justified, on the assumption that the rates in force down to the end of 1892 ought to be considered to have been not more than reasonable in 1888.

THIS was an application under section 1 of the Railway and Canal Traffic Act, 1894. The applicants were oil refiners, carrying on business at Manchester and Liverpool, and they complained of an increase in the tonnage rate since 1892 of

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

articles in Classes I. and II. from these places to certain stations on the respondents' railways, to an extent not exceeding 5 per cent. They also complained of an increased charge for the carriage of "smalls," or consignments of not more than three hundredweight, caused by an alteration in the scale of charges in force in 1892. They further complained of an indirect increase of those rates to Manchester, which did not exceed 12s. 6d. per ton, and which included a charge for the service of cartage in Manchester; caused by the substitution of a graduated rebate for a uniform one of 1s. 6d. per ton, where the applicants did not require the respondents to render such service of cartage.

There was a further complaint of an increase in the charges for "returned empties," but the Court held that the applicants had failed to show that this increase had affected their interests, and this part of the application was therefore dismissed.

The applicants further contended that the respondents, the London and North-Western railway company, were bound, under section 14 of the Regulation of Railways Act, 1873, to have in the rate-book a station-to-station rate, wherever they booked or carried from station to station; whereas the railway company had many of the rates only entered as "collected and delivered rates."

The railway companies in their "answers" pleaded that any increase which had been made in the rates was a reasonable increase. With regard to the "smalls," they pleaded that the change of system of calculating the charges was in accordance with the basis fixed by Parliament, and had been on the whole beneficial to the applicants. With regard to the rate-book, they stated: "The applicants have in fact always known the rates from Manchester station, for they have always known the allowances made by the North-Western company from the rates, where the applicants have done the carting to that station. The North-Western do not admit that they are under any obligation to publish such rates, and submit that it would be unreasonable to compel them to do so. The North-Western company will further contend that the Court has no jurisdiction to order them to publish such rates in their rate-books. The North-Western company do not contend that they may refuse,

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and in fact do not refuse, to receive and forward traffic of the applicants when tendered by them at Manchester station, except upon payment of charges for cartage at Manchester."

The facts proved, and the arguments of counsel, are sufficiently stated in the judgments.

Balfour Browne, Q.C., Cyril Dodd, Q.C., and Waghorn, appeared for the applicants.

Cripps, Q.C., and Ernest Moon, appeared for the London and North-Western railway company.

Cripps, Q.C., Asquith, Q.C., and Harold Russell appeared for the Great Western railway company.

C. A. Russell, Q.C., and Ernest Moon appeared for the Lancashire and Yorkshire railway company.

Cripps, Q.C., Asquith, Q.C., and Noble appeared for the Midland railway company.

Little, Q.C., and Ernest Moon appeared for the North Staffordshire railway company.

Ernest Moon appeared for the Cheshire lines committee.

C. A. Russell, Q.C., and Ernest Moon appeared for the Great Central railway company.

WRIGHT, J. : The principal complaint of the applicants in this case is of increases made in 1893 by the railway companies in their rates on goods traffic in Classes I. and II. In that year there was an advance of a great number of goods rates by railway companies to the extent of between 3 and 5 per cent., and under the Railway and Canal Traffic Act of 1894 we have to decide whether that advance was reasonable. The question has been fought on grounds which are not peculiar to the particular traffic of the applicants, but affect the whole goods and mineral

traffic of all the railways in the United Kingdom, and future as well as past increases of rates.

The Act throws upon the railway companies the burden of justifying any increase of rates beyond the amounts which were charged at the end of 1892. This burden they seek to discharge by proof that there has been an increase in the general cost of working the traffic, an increase which, as they allege, had begun some years before 1893 and has proved to be permanent and progressive, resulting principally from greatly increased cost of labour consequent on reductions in the daily hours of work.

Elaborate tables have been prepared by three of the most important companies in support of their case. Those of the Midland company are the most convenient for consideration in the first instance, because they attempt to distinguish the cost of goods from that of mineral traffic. They may be summarised approximately as follows—the years 1888 and 1892 being adopted for purposes of comparison because the great rise in the cost of carriage began after 1888:—In the five years 1888 to 1892 the goods tonnage (as shown in the returns made to the Board of Trade) increased from about 10 millions to about 11½ millions, or 15 per cent.; the goods train mileage from 10 millions to 12·3 millions, or 24 per cent.; the goods receipts from 2·85 million pounds to 3·43 million pounds or 20·3 per cent.; the goods expenses, *as estimated*, from 1·5 million pounds to 2 million pounds, or 33 per cent. A thousand tons of goods earned, in 1888, 285*l.* at an estimated cost of 150*l.*, and earned in 1892 299*l.* at an estimated cost of 174*l.* A thousand train miles of goods traffic (shunting mileage being excluded) earned in 1888 285*l.*, at an estimated cost of 150*l.*; and in 1892 277*l.*, at an estimated cost of 157*l.* A thousand pounds of goods receipts cost (as estimated) 537*l.* in 1888, and 567*l.* in 1892, an increase of 5·6 per cent. These increases of cost as compared with receipts were progressive in each year from 1889 to 1892, and they have continued down to 1898 if the costs and earnings of goods traffic are at all proportional to the total expenses and earnings of the company; for every 1,000*l.* earned by the company cost in 1888 528*l.*, in 1892 555*l.*, in 1898 590*l.*, or 5·1 per cent. more in 1892 than in 1888, and 6·3 per cent.

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more in 1898 than in 1892. Whatever basis of comparison is adopted, the result is always of the same kind. The tables of the other companies show substantially similar results. The weak point in all of them, including those of the Midland company, is that the statements of the cost of the goods traffic are only estimates. The accounts of railway companies in this country are not so kept that the cost of the goods traffic can be separated from the cost of mineral traffic, or both of them from the cost of passenger traffic, with any degree of accuracy; and in the present case the correctness of the apportionment of particular heads of expense among the three great branches of traffic was strongly impugned. But after making large allowance for errors of apportionment, enough remains, in my opinion, to justify the allegation of the railway companies that the cost of goods traffic had grown between 1888 and the end of 1892—both absolutely, as compared with the growth of the tonnage carried or of the train miles run, and relatively, as compared with the earnings—to such an extent that if the increase of cost was likely to be maintained, and still more if it was likely to be further progressive, an advance of rates in 1898 to the extent of 3 per cent. was justified on the assumption that the rates in force down to the end of 1892 ought to be considered to have been not more than reasonable in 1888.

In *Rickett Smith's Case* ⁽¹⁾, Mr. Justice Collins seems to say that where (as in the present case) some advance of rates above the level of 1892 is shown to be reasonable, there is a presumption that rates which were in force from 1877 to the end of 1892 were reasonable when they were fixed in 1877, and, if so, there must be a similar presumption that the same rates were reasonable when they were fixed in 1872 and continued so in 1888; and assuming, as I am bound to do, that this view is correct, I cannot see any answer to the railway companies' case to the extent which I have mentioned. I do not think that this part of the judgment in *Rickett Smith's Case* is questioned or considered at all in the *Mansion House Case* in the Court of Appeal ⁽²⁾. But, apart from the authority of *Rickett Smith's*

⁽¹⁾ *Ante*, Vol. IX. 114.⁽²⁾ *Idem*, 174.

Case, I should have thought it very doubtful whether, in view of the dissatisfaction which found expression in the inquiries and legislation of 1888—1894, it could now be presumed, for the purposes of an inquiry under the Act of 1894, that the rates were reasonable either when they were fixed or in 1888; and, in view of the great importance of the matter, I think it right also to consider the case on the assumption that there is no presumption that the rates were reasonable in 1888.

It is conceded by the applicants, and rightly conceded in view of the decision of the Court of Appeal to which I have referred, that there is a presumption that the rates as they existed at the end of 1892 were then reasonable, but it is contended that under that concession the railway companies are already allowed all the relief which they could be entitled to obtain on the ground of increased cost up to that time; and it is denied that increases of cost before the end of 1892 can be a legitimate ground for any further advance of rates in and after 1893.

In considering, under the provisions of the Act of 1894, whether an increase of a rate has been reasonable, we are not, in my opinion, precluded from having regard to any circumstances which may tend either to justify the increase or to prove it unreasonable. A particular rate may be affirmatively shown to have been unreasonably high in 1892, and in that case we should not be bound to allow an increase of it even though the cost of the service rendered for it may have been increased since 1892. Or it may be possible to show it to have been unduly low in 1892 in proportion to the cost of the services rendered; and, in that case, we might perhaps allow an increase of the rate even without proof of any increase in the cost of the services. In judging of a proposed increase for 1893 over 1892, we must first ask whether it is shown that the cost in 1893 will be higher than the cost in 1892. But, in order to answer that question, it must in general be necessary to consider the circumstances and events of previous years, and if they indicate that there was a strong probability of an increase of cost in the immediate future, and if events have shown that such an anticipation had been verified in fact, there may be sufficient ground for allowing a corresponding or some increase of charge. And, even if an advance of cost in the

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previous years is not likely to be further progressive, still, if it is likely to continue, I think it may be taken into consideration as a ground for an increase of rate, in so far as it has not formed part of the justification for the previous rate as it existed in 1892 nor been adequately allowed for in it. Substantially similar views seem to have been adopted by Mr. Justice Collins in the cases above cited, and rather approved than disapproved by the majority of the Court of Appeal in the *Mansion House Case*.

The estimation of the amount of increase which can be held reasonable on grounds of this kind cannot be based on any certain grounds or measure. We should have to consider what increase of cost the railway managers were, at the beginning of 1893, justified in expecting to occur through 1893, and through whatever further time it would be reasonable for them to allow to pass before again disturbing trade by a new alteration of rates. I think it would have been reasonable for them to consider that the rise of cost in 1892 had not been ascertained or considered at all in the rates in force to the end of 1892, and that would give them on the figures of the Midland company a justification of increase to the extent of at most about 20,000*l*. Further, I think they might properly calculate upon and provide for a somewhat greater further increase of cost in 1893. Adding the two together they would at most have been justified in this manner in adding 50,000*l*. to their goods rates. This, if spread over the whole of the goods traffic, might justify a general increase of about 1 per cent. In the case of the London and North-Western company the extreme justifiable increase would be not quite so much, in the case of the Great Western company rather more. If this was the proper view of the law I should come to the conclusion that the increase in 1893 is not shown by the evidence before us to have been then justified to an extent exceeding 1 per cent.

I desire to add that, although in my opinion the railway companies are entitled to succeed to the extent which I have indicated, on one view of the presumptions which it may be proper to make, I think that they rested their case on a wrong basis. They strenuously contended that it was enough for them to show an increase in the ratio of cost to receipts to an extent

equalling or exceeding that of the advance in the rates. Such an increase may, as Mr. Justice Collins observed in the cases cited, and in the *South Yorkshire Case*, be evidence to show that an increase of rates is reasonable, and may be sufficient evidence where no disturbing elements exist. But an increase in that ratio cannot of itself either absolutely justify an increase of rates, or be of itself the measure of the justifiable increase. Nor can I find anything in the judgments of Mr. Justice Collins to support that contention. To hold that, would in effect be to guarantee the existing dividends of the railway companies so far as an increase of rates could be made without defeating its own object. That, of course, is not the intention of the Railway Acts. The real security of investors for the maintenance of existing rates of dividend, so far as any such security exists, is the absence of any power to compel the railway companies to reduce their charges below the level of 1892, coupled with the right to raise them on proof that the increase is reasonable. The rates as they existed at the end of 1892 being presumed to have been not excessive, I think the proper test may be stated as follows:—If it is shown, after all elements of cost and economy have been taken into consideration, that the necessary cost per ton carried will under uniform conditions be increased by 1s. or any other sum without any compensating circumstance, then it is *prima facie* reasonable to increase the charge by the same sum. If this is right, then the ratio which the railway companies contend should be maintained cannot be maintained as a measure for increase of rates. Every increase of cost, even though followed by an increase of charge, must alter the ratio, unless there is an exactly corresponding increase in the receipts; and the maintenance of the ratio would in every case where the costs were less than half the receipts give the railway company a profit increasing with every increase of cost and charge, unless the increase of charge was so great as to diminish the traffic.

Lastly, it must be observed that this case has been contested on the question of the principle of a general increase of rates in 1893, and we have not considered in detail the case of any particular company or class of traffic. It may be that in these or other proceedings, traders may be able to show that in the case

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of a particular company there have been exceptional and unjustifiable increases, or that in the case of some particular kind of traffic the cost of that traffic has not shared in the general increase of cost. We have taken into consideration only those great aggravations of cost which *primâ facie* affect traffic generally. There may be traffic which they do not affect, or affect only in a less degree.

The result is that in our judgment the increase of rates in 1898 has been proved to have been reasonable to the extent of 3 per cent., subject to any exceptions which the traders may be able to establish in particular cases. But if the Court of Appeal should decide that increases of cost between 1888 and the end of 1892 did not justify an increase of rates in 1893, except in so far as those increases of costs might properly have led to an inference that they would be aggravated after 1892, the extent of justified increase would have to be reduced to 1 per cent.

SIR FREDERICK PEEL : This is a complaint under the Railway Traffic Act of 1894 that a direct increase in certain rates between Liverpool and other places, and Manchester and other places, which has been made since the 31st December, 1892, is unreasonable. The articles which the applicants send or receive by railway, and the carriage of which is charged at the increased rates, are all either in Class I. or in Class II., and are chiefly oil, grease, and tallow. The increase was made in March, 1893, and was part of a general increase of class rates.

The Board of Trade had under the Railway Traffic Act of 1888 prepared a new classification of traffic, and new rates and charges, and these had come into operation on the 1st January, 1893. The new maxima in conjunction with the new classification worked out in some cases below the old actual rates, and any rates so affected had of course to be reduced. But in general they were of higher amount, and gave the companies a margin to meet contingencies. The companies, however, made an immediate use of the margin and began the year 1893 by making all rates equal to the new maxima. This alteration, as it affected in particular the special rate traffic, met everywhere with so strong an opposition that the settlement of rates upon the maximum powers was not long maintained. Traders got

again their special or exceptional rates, and class rates, where not reduced by Parliament, returned to what they were in 1892, with an addition, however, not exceeding 5 per cent.

It is this 5 per cent. increase as it bears upon the applicants' traffic in Classes I. and II. that is alleged to be unreasonable. The railway companies have under the Act of 1894 the burden of proving that the increase complained of is reasonable, and the circumstance they rely on for this purpose is the increase in working expenses prior to 1893. This it should be observed is a different ground from that originally put forward. When in May, 1893, the House of Commons appointed a Select Committee to inquire into the manner in which rates had been raised since the 31st December, 1892, the evidence given before that Committee on behalf of the Railway Association was to the effect that the rates increased 5 per cent. were so increased to make up for the loss of revenue arising on other rates, which through being above the new maxima had to be lowered and brought within them. There was at that time no mention of increased expenses as a ground for the 5 per cent. advance, and though it was said that working expenditure had increased, it was added that if the revision by Parliament had left the existing rates intact and as it found them there would have been no raising of any rates. It is, however, no part of the answer to the present application that certain rates had been reduced under Parliamentary compulsion. What the respondents say is that from the point of view of working expenses, and their increase since the rates charged to the applicants were first put in force, the 5 per cent. advance was reasonable. The bulk of the rates was fixed they say in 1872, and starting from that year they claim that in the succeeding 20 years, the change in working expenses was such that a raising of the old rates had become necessary. For evidence in support of this contention the London and North-Western and other of the respondent companies have made an apportionment of their total expenses between passengers and goods and minerals, and compared the percentage relation borne by expenses to receipts in the first and last years of the period, namely, 1872 and 1892, and in the intermediate years of 1880, and 1888 to 1891. And it appears

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from these tables that in 1892 the estimated cost at which their revenue from goods and minerals was earned, and the traffic carried, was, as regards its proportion to receipts, an increase over previous years. The proportion in the case of the London and North-Western company was 46·31 in 1872, 48·90 in 1880, 52·42 in 1890, and 54·56 in 1892. The applicants do not admit the relevancy of the tables, nor their sufficiency for the conclusion the respondents draw from them as to cost of working. As to their relevancy the applicants maintain that, according to the proper construction of the Act passed in 1894, an increase of rates, to be justified at all must be justified by something happening after the day named in that Act, and that nothing prior to January, 1893, can be considered. This point was much discussed in the *Rickett Smith Case*, and the conclusion we came to was that while rates as they stood before 1893 are presumed by the Act of 1894 to be sufficiently high, an advance shown to be necessary to accommodate them to circumstances may be allowed, even though the circumstances are of a date prior to 1893. Such date, however, ought, I think, to be within a time which does not extend far back. To compare 1892 with a year twenty years before is, I think, to take years that are too far apart. The alleged reason for choosing 1872 was that the bulk of the 527 rates complained of were then fixed; but it appears that this was not so, and that more than three-fifths of them were fixed in later years. Further the increase in the percentage of 1892 over that of 1872 is due in some degree to special conditions as to receipts, and only in part to difference in cost of working. 1872 was a year of large receipts, and increase of revenue depressed the percentage of cost in that year. It was much the same with 1880, and it will be sufficient, I think, to take for comparison with 1892, the more recent years in the tables, those, namely, from 1888 to 1891. Then as to the adequacy of the tables for the thing to be proved. The applicants say in the first place that the ratio for goods—the only class of traffic in question on the present occasion—may not be the same as that for goods and minerals together. It is in fact very different in the case of the Midland company. In the coal cases that company estimated the amount of their total

expenses which was due to their mineral traffic, and made it out that between 1880 and 1892 its percentage on mineral receipts increased more largely than the percentage for goods. The increase for minerals in the *Rickett Smith Case* was put at 7·41 per cent., and in the later *South Yorkshire Case*, after further investigation at 8·33; but the increase in goods alone in the same time was reckoned at 5·17 only.

Another ground on which the applicants object to the proportion between expenses and receipts as stated in the tables being taken to indicate the true relation between them, is the large element in expenses which is mere estimate, and the number of instances in which the companies differ in the way they divide expenses between the several classes of traffic. To mention two such instances, each company apportions traffic expenses on the traffic receipts basis, but, while the Midland reckon each pound of receipts from goods to be earned at double the cost as regards traffic expenses of 1*l.* from minerals, the London and North-Western and the Great Western estimate every pound they receive as costing the same under this head. So, too, as regards locomotive expenses, the London and North-Western and the Great Western treat every train mile, whatever the class of traffic, as of equal cost, while the Midland estimate a train mile to have a different value according to the class of traffic, a passenger, a goods, and a mineral train mile costing respectively in 1892 6·94*d.*, 9·29*d.* and 11·68*d.* The respondents' answer to this objection is, as I understand, that the object of the tables is not so much to determine the exact relation between expenses and receipts at any particular time as to show the fluctuations in the relation at different times, and that so long as each company keeps to its own way in working out the proportion in different years one way is as good as another for that purpose.

The applicants next assert that it does not follow that it is reasonable to increase rates because it is shown that there has been a rise in the ratio of expenditure to receipts. This is perhaps ground common to both sides. Mr. Asquith did not ask to increase rates in a case where, as a set-off to an increase of expenditure per cent. of receipts, receipts also increase in the same proportion or even to the same amount. Discussing the

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question to what extent is the company justified in increasing rates, he said, "what we say is that while, rates remaining at 100*l.*, the expense of earning that 100*l.* has risen from 50*l.* to 55*l.* you are justified in redressing the balance, in filling up as it were the inroad which has been made upon your net revenue—in other words in adding 5*l.* by way of charge, bringing your receipts to 105*l.* You maintain your net revenue, and you get rid of the disturbance of the balance between receipts and expenditure which is due to the increased cost. All we say is we wish to maintain the net revenue at the level at which it was before." The complaint that is made, and that we have to determine, is that the increase of rates was unreasonable. It lies on the respondents to prove that it was reasonable, and the circumstance they rely upon to justify it is increase in cost of working. This is no doubt an element to be regarded in determining reasonableness, but it is not I think to be regarded to the exclusion of other elements, such as receipts and net revenue. What was said as to the import of reasonableness, and how to test it, in the *Canada Case* ⁽¹⁾ has been referred to, but it is not, I think, applicable to the case before us. In the *Canada Case* the International Bridge company had power to charge what it pleased for the use of the bridge by railway trains, and its Act imposed no limit on what it might charge, nor was there any limit, other than such, if any, as might be implied by law—namely, that charges should not be unreasonable. It was the contention of the Canada Southern railway company that the tolls charged were not at reasonable rates, not with reference to the service rendered, or its benefit to the persons against whom they were charged, but merely having regard to the capital expenditure on the bridge, and the return it yielded; and this it was decided was not a matter by which reasonableness of charge could be tested. In the present case the railway companies have to justify their increase of rates, and they say it was required to meet the increased cost at which traffic was worked, and if this is made out, if, for example, a service the receipts from which are 100*l.* did cost 50*l.* and now costs 55*l.*, the

(1) *Canada Southern Railway Company v. International Bridge Company*, 8 App. Cas. 723.

receipts remaining the same, it might be reasonable to make good the loss of net revenue by an addition to rates. If, however, by some other means, as by the greater quantity carried the receipts from the service which cost an extra 5*l.* have also increased by the same amount, an addition to rates as another source of revenue is not then necessary. Turning to the tables from 1888 to 1892 they show a progressive increase of expenses down to the close of 1891. The London and North-Western increase (goods and minerals) was from 3,118,000*l.* in 1888 to 3,658,000*l.* in 1891. The Great Western (also goods and minerals) from 2,090,000*l.* in 1888 to 2,541,000*l.* in 1891, and the Midlands (goods only) from 1,529,000*l.* in 1888 to 1,930,000*l.* in 1891. There was also a continuous increase in receipts. The London and North-Western from 6,198,000*l.* to 6,803,000*l.* (goods and minerals), the Great Western from 4,269,000*l.* to 4,718,000*l.* (goods and minerals), and the Midland (goods only) from 2,849,000*l.* to 3,427,000*l.* The increase, however, in receipts was at a lower rate in 1891 than in either of the two preceding years. It was a less favourable time for railway business, and, but for the effect the slackening in the rate had upon the gross receipts, the increase of 2·64 in the percentage of expenses to receipts in 1891 as compared with 1888, taking the Midland figures, would probably have been less. But whatever part of it may have been occasioned in this way, it is evident expenses form a larger proportion of receipts in 1891 than in 1888, and that the same amount of traffic cost the company more to work, chiefly it may be supposed from increased cost of labour through higher wages and shorter hours of work. The increase represents a difference of about 90,000*l.* in the amount of net revenue, and to maintain it without reduction would have required an addition of between 2½ and 3 per cent. to the gross receipts. As to the London and North-Western and Great Western, it can only be a conjecture what portion of the rise in expenses belonged to their goods traffic; but its proportional amount to goods receipts was probably about the same as in the case of the Midland company. With regard to 1892, except that there was a falling-off in the traffic receipts of the London and North-Western, both receipt and expense were stationary, and remained

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at the level of 1891. Expenses which had increased so largely in the two previous years showed no further increase in 1892, and as regards therefore the necessity of making provision for an anticipated growth of expenditure, the experience of 1892 did not warrant the addition to rates on that ground.

On the whole, it seems to me that the respondents had a case for increasing the rates on the applicants' traffic, but that the ground on which it is made out did not justify any particular rate being increased more than 3 per cent.

The next point is the increase made in 1893 in the rates for small parcels, that is, consignments not exceeding 3 cwt. These parcels are charged their proportion according to weight (the stages in the scale for weight rising by 14 lbs.) of the tonnage rate applicable to the article in the consignment, and which would constitute the charge for it if it weighed over 3 cwt., and to this proportion is added an amount which before 1893 seems to have been 3*d.* per parcel where the tonnage rate did not exceed 20*s.*, 4*d.* where it did not exceed 25*s.*, 5*d.* for 30*s.*, and so on. The tonnage rate depends, of course, on the class of article consigned and the distance sent, and may be any sum from 3*s.* 4*d.* as a minimum to 150*s.* Before 1893 a consignment weighing 1 cwt., and a ton of which at the rates then in force would have had to pay a rate say of 15*s.*, would have been charged $\frac{1}{20}$ th of 15*s.*, or 9*d.*, plus a parcel addition of 3*d.*, or in all 1*s.* Since 1893 the 9*d.* has increased to 10*d.* in consequence of the tonnage rate of 15*s.* having become 15*s.* 9*d.* by the 5 per cent. increase, and so far as the increase of the tonnage rate is justified, this of the parcels rate is also justified. But this is not the whole increase. Since 1893 the companies have also increased the parcels addition by 1*d.*, and where the addition before was 3*d.* it is now 4*d.*, where before 4*d.* it is now 5*d.*, and so on. In the instance given above, the parcel, therefore, now pays 1*s.* 2*d.*, or 10*d.* plus 4*d.*, an increase of 16 per cent. In some cases the charge for small parcels is increased not only by the 5 per cent. addition to the tonnage rate, and the penny added since 1893 to the parcels addition scale, but also through its tonnage rate as it was in 1892 being near the amount where there is a rise in the parcels scale. The scale rises one penny

when the tonnage rate exceeds 20*s.*, and again when it exceeds 25*s.*, 30*s.*, and other amounts. And the parcel whose tonnage rate in 1892 was 24*s.* or 25*s.*, and is now 5 per cent. more, or over 25*s.*, becomes chargeable under a higher part of the scale than it was chargeable under before. A 1 cwt. parcel whose tonnage rate in 1892 was 24*s.* would now pay 1*s.* 10*d.* instead of the 1*s.* 7*d.* which was the former charge. Such increased charges are not, I think, justified on the increased cost basis. They do not affect all packages of 3 cwt. or under, but for those they do affect the increased payment seems to me to be more than proportional to the increased service rendered, or increased cost of service.

The complaint that the London and North-Western have reduced the Manchester cartage rebate of 1*s.* 6*d.* to 1*s.* where the rate is under 12*s.* 6*d.*, and to 10*d.* where it does not exceed 8*s.* 4*d.*, and that the substitution of a graduated rebate of these amounts for a uniform one of 1*s.* 6*d.* is an indirect and undue increase of the charge for transit on the railway, was dealt with by us during the hearing; as was also the complaint that the scale of C and D charges per hundredweight for returned empties as regards the portion for distances from 50 to 300 miles has been increased 1*d.*

The remaining complaint is that the class rates issued by the railway company and published in their rate-books are collected and delivered rates, and that section 14 of the Act of 1873 is insufficiently complied with if the rate-books do not show what the class rates are as station-to-station rates; and as to this complaint, it was pointed out by the Court that whether section 14, as to the entries it requires, goes to the extent suggested or not, and that it is questionable that it does, it is the right of every person interested to require a railway company to quote him a station-to-station rate—that is, to let him know the charge for conveyance, and station and service terminals, apart from anything else, and that a station-to-station rate so stated to be the charge is one to which the section applies, and which must consequently be entered in the rate-book.

LORD COBHAM: With regard to the increase of the class rates complained of by the applicants in this case, I agree with the

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conclusions arrived at by my colleagues. The three principal respondent companies, bearing in mind the principles upon which previous decisions have been based, have endeavoured to show that the increase of these rates on January 1st, 1893, has been justified by the increased cost of service which has arisen between the dates of the original fixing of the rates and the end of 1892. They have selected 1872 as the year to be compared with 1892, but that was a very abnormal year and too far back, a large number of the rates having been fixed since then. I agree with my colleagues that 1888 should be substituted, for the reason that the railway company's case is mainly founded on the increase of their labour bill, which only began to be marked in 1888. There is, too, a great advantage in taking a comparatively recent year, for the shorter the period between the two selected years the less scope is there for the operation of disturbing elements which would affect the conclusions sought to be established by the company's tables of expenditure compared with receipts.

Taking the Midland company first, their tables show that in the goods department the ratio of expenditure to receipts exceeded that in 1888 by about 3 per cent., and if we are right in taking these years for comparison, the justification of the increase of the Midland rates must be limited to that percentage. In other words, if we are satisfied that the increased ratio of 3 per cent. is due to increased cost of service, unavoidably incurred, the company is entitled to ask us to sanction an increase of their goods rates in 1893 to the extent of that percentage. Three per cent. on the gross rates of 1892 would be 103,000*l.*, and the question is whether we can accept the increased ratio as adequate proof that the expenditure has increased by that amount. In this inquiry we are much assisted by the figures supplied by Mr. Turner. They show that between 1888 and 1892 the wages of the men working the Midland locomotive engines have increased, after allowing for increased train mileage, by 76,183*l.*; the wages paid for maintenance and renewal of the permanent way, and works, have increased, after allowing for additional mileage of line, by 66,072*l.* The wages in the traffic department, 1892, were 92,840*l.* more than they

would have been if the receipts in that year had been earned at the same proportionate cost as in 1888. Whatever division of these figures must be reasonably taken to bring out the increase that should be allocated to the goods department, the result cannot, I think, be less than a sum equal to $2\frac{1}{4}$ per cent. of their gross receipts.

We have not, unfortunately, got the necessary figures as to the cost of locomotive coal, but it is certain, I think, that its increased price between 1888 and 1892 would at least equal the amount required to make up the 3 per cent.

Against these important classes of expenditure showing increases, only one, it seems to me, can be set, showing possibly a contrary tendency, namely, wagon repairs. But there the inference to be drawn from the figures is very doubtful. On the one hand the cost of repairs per wagon appears to have increased in a far greater proportion than on the Great Western and North-Western systems. On the other hand, the number of wagons in use as compared with the tonnage carried, seems also to have greatly increased. It is not probable, in my view, that either of these conclusions is well founded; and until they are revised, the possibility at least of some set-off against increased expenditure must be borne in mind.

I am of opinion that our decision as regards the Midland should apply also to the London and North-Western and the Great Western companies. *Prima facie* it is reasonable to suppose that wages and the cost of coal have increased in much the same degree on the systems of all three companies. It is true that in the case of the London and North-Western and Great Western the ratios of expenditure to receipts in goods and minerals in the selected years show an increase of about 5 per cent., but the tables are less trustworthy than those of the Midland, for they are not supported by figures such as Mr. Turner's, and no discrimination is made between goods and minerals. So far as direct figures have been given they tend to support the general conclusion at which we have arrived. Three per cent. on the gross receipts of the North-Western company is nearly 128,000*l.* We are told that between 1888 and 1892 the cost of dealing with the goods traffic has increased

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by 2*d.* per ton, or 87,500*l.* on the tonnage of 1892, and as this does not include the increased price of coal, or the wages of the men in the locomotive department, and at small stations, or of signalmen, I do not think the London and North-Western company is too favourably treated if we regard their case as made out to the extent of 3 per cent. at least.

The criticisms of the applicants' counsel, and of their expert witness, Mr. Fells, deserve full consideration, but they have been mainly directed against the "ratio" method of proving an increase of expenditure, and they do not, I think, materially add to the arguments urged in the same sense in the *Mapperly Case*. If the tables were then held to prove the point contended for, it should be much more difficult to impugn them now, when the contrasted years are only five years apart instead of twelve, and when they have been fortified and supplemented by more direct and detailed evidence.

Much was made of the differences in the manner of working out their results to be found in the three companies' tables. But the comparison is not between the companies but between the ratio of expenditure to receipts in two selected years in the case of each company separately.

Again, we have heard renewed objections to the method adopted of apportioning to the department concerned its *quota* of expenditure, and the argument has been repeated that the wages of signalmen and of relief locomotive men should be debited to passenger traffic. These points have already been dealt with, and, speaking for myself, I do not consider myself free, in the absence of fresh arguments and facts, to question decisions in which I concurred, and which have not been overruled. Whatever the materials supplied to us, it cannot be expected that an inquiry such as the present one can bring out exact results. We must be governed by broad considerations, and these I hold lead us in this case to the conclusions we have stated. Under the main heads of expenditure, where we should expect, as a matter of common knowledge, that increases have taken place, figures showing this have been given which have not been substantially questioned, and which are not inconsistent with the more general tables presented by the companies. On the other

hand, with the exception of wagon repairs above referred to, no attempt has been made to set off any important decrease of cost or economy in administration or working of traffic against the increases which have been proved. The wages of no class of railway servants have been shown to be less in 1892 than in 1888; and in regard to materials, against the considerable depreciation in copper and petroleum may be set increases in the price of pig-iron and tallow. Steel rails were practically unchanged. Some administrative or working economies due to the increased business experience of the companies there may have been, but they have not been indicated, and in so short a period they could not seriously affect the broad result. In any case the tables would give full effect to them.

With regard to the "smalls" rates, I agree with what has been said by Sir Frederick Peel.

[Solicitors for the applicants: *Neish, Howell, and Macfarlane.*

Solicitor for the London and North-Western railway company: *C. H. Mason.*

Solicitor for the Great Western railway company: *R. R. Nelson.*

Solicitors for the Lancashire and Yorkshire railway company: *Woodcock, Ryland, and Parker, for Moorhouse, Manchester.*

Solicitors for the Midland railway company: *Beale & Co.*

Solicitors for the North Staffordshire railway company: *Burchell & Co.*

Solicitors for the Cheshire lines committee: *Cunliffes and Davenport, for Lingards, Manchester.*

Solicitors for the Great Central railway company: *Cunliffes and Davenport, for R. Lingard Monk, Manchester.]*

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*Increase of Coal Rates—Justification of Increase—Comparative Tables—
Discovery of Documents—Documents to show Extent and Profits of
Applicants' Business—Damages—Railway and Canal Traffic Act, 1894
(57 & 58 Vict. c. 54), s. 1—Railway and Canal Traffic Act, 1888
(51 & 52 Vict. c. 25), s. 12.*

March 21.
May 18.
June 5, 6, 7, 8,
10, 11, 12, 13.
October 30,
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Section 1, sub-section 1, of the Railway and Canal Traffic Act, 1894, enacts that—"where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an Act of Parliament or by any Provisional Order confirmed by Act of Parliament."

Upon a complaint, under the above section, by colliery owners that the respondent railway companies had, in December, 1899, increased the rates for the carriage of coal to an extent varying from the sum of 1*d.* per ton on rates not exceeding 2*s.* per ton, to the sum of 3*d.* per ton on rates exceeding 5*s.* per ton, and that such increase was unreasonable, the railway companies alleged that the increase was reasonable on the ground that the cost of working their coal traffic had increased owing to shortening of hours of labour, increase of price of fuel, additional capital expenditure, and other causes.

Held, that the evidence given by the railway companies as to the cost of working did not prove that when the coal rates were raised at the end of 1899 the cost of carrying that traffic showed such an advance upon the cost in previous years as to require or justify the raising of the rates.

To justify a permanent increase of rate, changes affecting only temporarily cost of working (such as high price of locomotive coal) are not sufficient.

The Commissioners ordered an inquiry to be taken before the Registrar as to the damages sustained by the applicants in consequence of their having been compelled to pay these increased rates since 1st January, 1900, and held, that on such inquiry it would be open to the railway company to show, by any competent evidence, that damages had not been sustained by the applicants, and in particular that the increased rates had been, in whole or in part, truly borne by other persons.

(1) Before Lord STORMONTH DARLING, and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Parliament House, Edinburgh.

Held, by the Court of Session (affirming LORD STORMONTH DARLING) that the railway companies were not entitled to discovery of the business books and accounts of the applicants in order that extracts might be taken therefrom to show the amount of coal sold by the applicants, the cost of working it and the profits made.

THIS was an application under section 1 of the Railway and Canal Traffic Act, 1894. The applicants sent large quantities of coal and dross traffic from their collieries by the railways of the Caledonian company, the North British company, and the Glasgow and South-Western company, to places on the railways of these companies, and also to places on other railways connected with the railways of the Caledonian company, the North British company, and the Glasgow company respectively.

The applicants complained of an increase on the railway companies' rates for coal, coke, and dross, since December, 1899, amounting to 1*d.* per ton on rates not exceeding 2*s.* per ton, 1½*d.* per ton on rates between 2*s.* and 3*s.* per ton, 2*d.* per ton on rates between 3*s.* and 4*s.* per ton, 2½*d.* per ton on rates between 4*s.* and 5*s.* per ton, and 3*d.* per ton on rates exceeding 5*s.* per ton. They asked for an order declaring these increased rates unreasonable, and they claimed as damages the amount of the increases paid by them on their traffic on and after January 1st, 1900.

The railway companies, by their answer, stated that the increases in the rates were moderate and reasonable, having regard to all the circumstances; that the working expenses of the applicants' traffic had greatly increased, owing to shortening of hours of labour, increase of price of fuel, additional capital expenditure, and other causes. They denied the claim for damages.

The railway companies applied to the *ex-officio* Commissioner for Scotland, under rule 85 of the Railway Commission Rules, 1889, for a diligence to recover certain books and documents. The specification of documents called for was as follows:—

“ 1. All books, accounts, abstracts, statements, reports, returns, and other documents or writings made or kept by or on behalf of the applicants or their predecessors in business from 1871,

1901. that excerpts may be taken therefrom for each of the years from
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 (a) The quantities of coal, coal nuts, coke, culm, gum, duff, peas, beans, dross nuts, or other descriptions of small coal or dross, and the different descriptions and qualities thereof, sold by the applicants or their said predecessors from each of their collieries and pits, and the prices (pit and otherwise) charged and received by the applicants and their said predecessors for such minerals.

(b) The quantities and prices of such minerals despatched from said collieries by the railways of the respondents, or any of them, as distinguished from the remainder of such minerals, and by whom the railway rates and charges were borne and paid.

(c) The quantities and prices of such minerals despatched to the stations and places set forth in the schedules to the application, as distinguished from the remainder of such minerals, and by whom the railway rates and charges were borne and paid ; and

(d) The quantities and prices of such minerals despatched for shipment, as distinguished from the remainder of such minerals, and by whom the railway rates and charges were borne and paid.

2. All books, accounts, abstracts, statements, reports, returns, balance-sheets, and other documents or writings made or kept by or on behalf of the applicants or their predecessors in business from 1871, that excerpts may be taken therefrom for each of the years from 1871 to 1900, both inclusive, of all entries showing, or tending to show, the total expenditure, including lordships, royalties, wayleaves, oncost, and cost of working and raising the minerals incurred by the applicants or their said predecessors in carrying on their business as coal-masters at or from the collieries mentioned in the application, and in working, winning, and marketing their foresaid coal and other minerals.

3. All books, accounts, abstracts, statements, reports, returns, balance-sheets, and other documents or writings made or kept

by or on behalf of the applicants or their predecessors in business from 1871, that excerpts may be taken therefrom for each of the years from 1871 to 1900, both inclusive, of all entries showing, or tending to show, the gross and net profits or losses of the applicants or their said predecessors accruing from their business as coalmasters carried on at or from the collieries mentioned in the application, and the appropriation of such profits.

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4. All books, accounts, abstracts, statements, reports, returns, balance-sheets, and other documents or writings made or kept by or on behalf of the applicants or their predecessors in business from 1871, that excerpts may be taken therefrom for each of the years from 1871 to 1900, both inclusive, of all entries showing, or tending to show, the amount and objects of or relative to capital expenditure by or on behalf of the applicants or their said predecessors at or in connection with each of their collieries mentioned in the application.

5. All plans, sketches, drawings, estimates, specifications, or other documents showing, or tending to show, the railway connections between the collieries mentioned in the application, and the railways of the respondents, or any of them, and all lines of railway or branches or sidings at, or connected with, such collieries from 1871 to 1900, both inclusive, and any alterations made from time to time during the aforesaid period upon such railways, connections, or sidings, or other additions, improvements, or alterations to or upon screening, washing, or cleaning coal, and small coal or dross, at or in connection with each of said collieries.

6. All books, accounts, abstracts, statements and other documents or writings made or kept by, or on behalf of, the applicants or their predecessors in business from 1871, that excerpts may be taken therefrom for each of the years from 1871 to 1900, both inclusive, of all entries showing, or tending to show, the cost and expense of the railways, branches, connections and sidings, and additions, improvements, or alterations thereon referred to in the immediately preceding article, and of the maintenance, repair, or renewal thereof.

7. All books, accounts, abstracts, statements, and other

1901. documents or writings made or kept by or on behalf of the applicants or their predecessors in business from 1871, that excerpts may be taken therefrom for each of the years from 1871 to 1900, both inclusive, of all entries showing or tending to show the number and earnings of and amount of traffic carried by wagons belonging to or hired or leased by the applicants or their said predecessors.

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8. Failing principals, copies of the above."

LORD STORMONTH DARLING: I have here to deal with a call for documents which confessedly raises a question of principle, and one of considerable importance to the proper working of section 1 of the Traffic Act of 1894. That section throws upon railway companies the onus of proving to the satisfaction of this Commission that the increase of any rate made by them since 31st December, 1892, is reasonable, and there are certain well-ascertained methods of doing so.

But I think it has never been recognised as among these methods for the railway company complained against to inquire into the business affairs of the trader complaining, into the volume of his trade, the cost at which he carries it on, or the profit which he makes on it. It would be very strange if considerations of that kind were held to be relevant, because railway rates are not fixed with reference to the poverty or riches of individual traders, but in order to yield a fair remuneration to the companies themselves for the services which they render. That is entirely consistent with Lord Selborne's view in *The Canada Southern Railway Case* ⁽¹⁾, because when he speaks of examining a rate "with reference to the service rendered and the benefit to the person receiving that service," he is arguing against the motion of testing the reasonableness of a rate by the profits of the railway company, and assuredly he gives no countenance to the notion of testing it by the profits of the trader. I agree with Mr. Justice (now Lord Justice) Collins, that "the reasonableness of the rate is not to be tried by its effect upon the trade of the persons who have to pay it": *Rickett, Smith & Co.'s Case* ⁽²⁾. Certainly if the condition of the trade

⁽¹⁾ 8 App. Ca. 723.

⁽²⁾ *Ante*, Vol. IX, 114.

in any particular class of goods is to any extent a legitimate subject of inquiry, that inquiry must be directed to the condition of the trade in general, and not to the profits or losses of any particular applicant.

It is, of course, a mere accident that these applicants produce an article which forms a large item in the expenditure of every railway company. An increase in the price of coal may form a most important consideration in judging whether an increase in a railway rate is justifiable. But the companies have in their own possession the proper means of proving that, and the proof of it will not be helped by the books of the applicants.

What the specification really does is to propose a searching examination, extending over thirty years, into every detail of the business carried on by the Lothian coal company and their predecessors—their output, their prices, their cost of working, their capital expenditure, their profits or losses, and many other things. If such a process were applied to each of the applicants in this congeries of cases, I do not know when the inquiry would end. Even if relevant, such a call would be objectionable, as being altogether out of proportion to the question in dispute. But it seems to me to be wholly irrelevant, and I therefore disallow the entire specification.

The railway companies appealed from this decision to the First Division of the Court of Session.

Guthrie, K.C. (*Cooper and Grierson* with him), for the railway companies.

The onus of proving that the increase was reasonable is on the railway companies. They desire to prove that the cost of carrying the traffic justified the increase, and that the coal trade can bear it. It is an important point to show that the coal traders are earning large profits, and can easily pay the increased rates.

Dundas, K.C. (*Clyde and Strain* with him), for the applicants.

It is not disputed that the coal trade could bear the rates, but that is not a relevant consideration in deciding whether

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the increase is reasonable: *Rickett, Smith & Co. v. Midland Railway Company* ⁽¹⁾; *Smith and Forrest v. London and North Western Railway Company* ⁽²⁾. Therefore the diligence should not be granted.

LORD PRESIDENT: The proceeding, in which this question arises, has been instituted under the Railway and Canal Traffic Act of 1894, section 1 of which in effect provides that in the event of railway companies raising the rates which have been authorised for carriage on their lines, the onus shall rest upon them of proving to the satisfaction of the Commission that any increase of rates made by them since 31st December, 1892, is reasonable. The railway companies must therefore, in this proceeding, justify the raising of their rates, or in other words, must prove that the rates which they are claiming from the traders are reasonable. As the initial onus is thus laid upon them, it will be for them to adduce such evidence as they think fit, in support of the proposition that the raising of the rates is reasonable, and if they tender no such evidence, the traders may possibly lead no proof, and say that as no attempt has been made to prove that an increase is reasonable, the Commission should refuse to sanction it. On the other hand, if the railway companies establish a *primâ facie* case for the increase of rates, it will be for the traders to adduce such evidence as they think fit to disprove the reasonableness of the increased rate which the railway companies propose to charge. Now, what the railway companies ask is a diligence of a very comprehensive character, although it has been greatly restricted to-day. The first call was for excerpts of documents of certain kinds for each of the years from 1871 to 1900, both inclusive. That I understand, is now limited to the period from 1897 to 1900, and, besides that, the last three articles of the specification are withdrawn. But four articles remain, subject to the limitation as regards time, to which I have just referred, and these articles are certainly very wide. The first calls for "all books, accounts, abstracts," and so on, "kept by or on behalf of the applicants or their predecessors

⁽¹⁾ *Ante*, Vol. IX. 114.

⁽²⁾ *Ante*, 156.

in business" for the period from 1897 to 1900, which would show the whole particulars and details of the business of every one of the applicants. The production of the documents called for would not only reveal their profits, but everything connected with their business. Now that is *primâ facie* a kind of discovery for which authority should not be granted unless some very cogent reason is adduced for giving access to the most private documents of the applicants.

The issue in the case, as I have already stated, is whether the increase of the rates is reasonable. Now that, as I have also pointed out, has to be proved by the railway companies who have raised the rates, and, in course of that inquiry, the companies will doubtless lead evidence on all the matters which they say make an increase of the fares reasonable. Among other things, the cost of giving the service will no doubt be gone into, and that seems to me to be a proper element to take into account. The cost of giving the service will involve a consideration of the prices which the companies pay for the things which they require and use, and also of the wages which they pay to the servants whom they employ in giving it. The prices which the companies now require to pay for coal, for example, which are said to be about double what they paid when the rates were fixed, will be a perfectly legitimate element for consideration. The companies say further that the cost of the service otherwise is greater, and in particular that their men work shorter hours, and that larger numbers of them are now required to do the same work than when the rates were fixed. All these things may be very pertinent to the question whether the increase in the rates is or is not reasonable. But the companies have in their own books all the materials for such lines of inquiry, and they now claim to be admitted into the full knowledge of all that relates to the business of their customers, the applicants—the most secret things which traders keep to themselves—the condition of their businesses, whether it is profitable, and if so, the amount of the profit, and if it is unprofitable, the amount of the loss. While the value or benefit of the service, as well as its cost, may be a proper matter for consideration, we have not been referred to any authority for granting such an application, and it seems

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to me that we should not give any countenance to the idea that such application should be granted, seeing that it could be allowed only upon the view that all the particulars of the trade of each particular coalmaster or trader who had carriage done for him by the companies, was material or relevant to the question of the reasonableness of the rate. Such an inquiry would doubtless reveal very different conditions in the businesses of the different traders, and the granting of the inquiry would suggest that the rates should vary according to the amount of profit that was being earned by the traders, or, to take an extreme case, that, if a trader was not making any profit he should get his goods carried at a rate lower than that charged to a successful trader. The fact that the particulars asked must differ in each case seems to show the inapplicability of the inquiry to what must be a general standard rate fixed by companies in exercise of the power to increase their rates on proving justification for doing so. One can see that when the companies have proved their grounds for increasing the rate, it will be open to the traders to put forward their evidence, and in proposing that we should refuse this diligence, I do not in the least suggest that there may not be ample scope for cross-examination of the traders when they say that the increased rates are not reasonable. It is not necessary for us now to decide what questions may be put in cross-examination, but if part of the case of the traders is to be that the trade cannot bear the particular rates, as it has sometimes been expressed, one can see that considerable latitude in cross-examination may be allowed to the companies. But by granting this diligence we would seem to assume that it was, or might be, a material element in the justification of a particular rate that some traders were making large profits, and that is an idea to which I do not think we should give countenance. The real issue being whether the rate is reasonable, it appears to me that the trading history, even for four years, of each particular trader is not legitimate matter for inquiry, although, as I have already said, if the traders come and give evidence that their trade cannot bear the rates, very considerable latitude in cross-examination of them may be allowed to the companies, and possibly the companies may also be permitted to adduce rebutting

evidence. For these reasons I think that we should refuse specification *in toto*.

LORD ADAM and LORD KINNEAR concurred.

The case was afterwards heard by the Commissioners on the merits.

Dean of Faculty (Asher, K.C.) (Grierson with him) for the North British railway company.

If increased cost, without any fault of the railway company, is proved on particular traffic, it is reasonable to increase the rate on that traffic. The railway company's accounts show the rate per mile for their whole traffic, and the ratio of expenditure to receipts for the whole traffic. If, therefore, a reasonable amount of interest on capital expended be added, the increase of cost shown on the whole traffic more than justifies 5 per cent. rise in the rates; and coal traffic is at least responsible for its share.

Solicitor-General (Dickson, K.C.) (Cooper with him) for the Caledonian railway company.

There have been no changes in the coal rates since 1879, when they were reduced in a time of trade depression. The new rate with the increase, taking a 15-mile distance, is lower than it was from 1865 to 1879. Thus, any presumption that the rate when fixed in 1879 was a reasonable one, is done away with. In 1879 locomotive coal was 3*s.* 4*d.* per ton, in 1899 it was 7*s.* 5*d.*, in 1900 12*s.* 5*d.*, and in 1901 8*s.* 2*d.*

The railway company's accounts only admit of finding the tonnage of coal as distinguished from other minerals, and the number of wagons used to carry that tonnage.

Guthrie, K.C., and Younger appeared for the Glasgow and South-Western railway company.

Dundas, K.C. (Clyde, Horne, and Strain with him), for the applicants.

The railway companies have failed to prove the reasonableness of the increase. The suggestion is to put a permanent increase on coal rates because of a temporary rise in prices.

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The service rendered by the railway company to the trader is a constant one—the carriage of so many tons of coal from A. to B.—whereas train mileage is so variable that it is only a factor in the total cost of service. A better measure would be to take the total cost of the coal traffic over a period of years, and divide by the tonnage.

The principle of apportioning the train mileage between goods and minerals on the basis of wagon loads cannot be admitted, as it assumes that the average run of goods and coal trains is the same distance, and that the average number of wagons is the same on each class of train.

The increased expenditure must be proved to be in regard to the coal traffic; a general increase on the whole system would not justify this demand. The manner in which the railway companies keep their accounts prevents them from demonstrating the necessary increase, although ever since 1894 they have known that they might require such evidence. All the tables depend upon conjecture, where they might have depended upon something much better.

SIR FREDERICK PEEL: The railway companies increased from 1st January, 1900, their coal rates of 2s. and under by 1d., and of higher amounts by 2d. and 3d. They sought to add about 5 per cent. to the rates, but on short-distance traffic the increase is considerably more. The old rates on the Glasgow and South-Western traffic of the applicants, Taylor & Co. and Messrs. Black and Sons, whose pits are within 8 miles of the shipping port, were 7½d. and 10d., but are now higher by 18 and 10 per cent. It lies on the respondents to prove that the increase is reasonable, and the ground on which they justify is the increase of cost in working their coal traffic, as indicated by tables in which the cost per train mile in 1899 and 1900 is compared with that of 1888 and 1892. That railway working generally would be dearer is, they observe, what might be expected from the rise in the prices of labour and materials, and from the expenditure, not always of a direct earning power, imposed upon companies by recent legislation. Statements, however, regarding traffic as a whole may not be equally applicable

to each of its different descriptions, and the respondents admit that to establish a case for their new charge on coal they have to show that the cost of conveying that portion of their traffic has become dearer, and this they assert is done by the test which they have chosen for that purpose. A difficulty attending the adoption of this test is that they have no accurate knowledge of their coal train mileage. The books of the North British and of the Glasgow and South-Western companies record only the train mileage of goods and minerals together, and those of the Caledonian the train mileage of goods on the one hand, and coal and other minerals on the other. To find, therefore, the number of train miles applicable to the coal traffic alone, the mileage of mineral traffic must be separated from that of merchandise traffic, and the mileage again of coal from that of other minerals. This the respondents have endeavoured to do by a calculation based upon the wagon load. They have particulars as to part of their goods and mineral traffic, of the actual number of wagons used for the respective tonnages carried, and for the North British company the average load per wagon of goods in 1900 is 2·17 tons, and of minerals 6·97, and for the Caledonian 2·57 tons and 6·79. They assume that the proportion of wagons to tonnage in such part of their traffic is the proportion also in the remainder, and as the mineral tonnage of the North British (to take that company in particular) in 1900 was 19,012,920 tons, and their goods tonnage 4,757,378, the mineral wagons were 55·44 per cent. of the total number engaged in carrying the gross goods and mineral tonnage, and on the assumption that what governs a train load is not tonnage, but number of wagons and length, without regard to the different weights of the truck load, and that all train loads, whether of goods or minerals, are carried the same average distance, the mineral mileage will have the same percentage of 55·44 as the mineral wagons, and accordingly out of the 8,775,108 goods and mineral train miles run by the North British company in 1900, 4,864,920 would be the mileage of mineral trains, and 3,910,188 that of goods trains. The percentage of the whole minerals in 1900, which was coal, was 77·65, and its train mileage therefore 3,777,610 miles. The Glasgow and South-Western do not

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divide their goods and mineral train mileage on the basis of the wagon load, but in the proportion of goods and mineral trains run on a test day in October, 1900, when mineral trains were 36 per cent. of the total number, and the mineral mileage, so found, is then divided between coal and other minerals in ratio to the tonnage.

The difficulty the companies have in finding the mileage of coal trains is experienced also in finding the cost applicable to coal alone. Only the total cost of working expenses under each head is given in the companies' books, and these totals therefore have, like mileage, to be divided between the different classes of traffic, and this is done by dividing them according to the mileage of the respective traffics as got at in the way described, certain items excepted which the respondents divide in ratio of traffic receipts, and subject also in the case of locomotive power to an allowance for an estimated difference in the running or engine cost of a train mile according to the class of traffic drawn by the engine. To find this engine cost, arrangements were made by each of the respondents for calculating the cost of all engines in steam over their respective systems on a particular day (18th October, 1900), and of the work done by the engines in the haulage of trains for each class of traffic, and the result obtained from this one day's test was to make the North British locomotive cost per train mile in 1900 per passenger train 6·46*d.*, per goods, 11·10*d.*, and per coal or other mineral, 15·28*d.* The total locomotive expenditure is then apportioned according to train mileage multiplied by these estimated rates in pennies per train mile. In this manner, and dividing the estimated amount of coal expenses by the estimated coal train mileage, the respondents arrive at the total cost per train mile in each of four years, 1888, 1892, 1899, and 1900, and comparing 1899 with 1892 (1900 being of later date than the matter complained of, and 1888 an exceptional year with prices of coal, pig-iron, and other materials, unusually low), the cost is brought out for the North British at 26·74*d.* in 1892, and 30·11*d.* in 1899, and for the Caledonian company at 35·47*d.* in 1892, and 42·90*d.* in 1899, and for the Glasgow and South-Western at 31·61*d.* in 1892, and 38·62*d.* in 1899.

The applications against the last-mentioned company, in addition to what they have in common with the other applications, have a complaint with reference to the way in which the scale for the increase of rate has been graduated, and its greater relative pressure on short-distance traffic. The increase is 1*d.* for every rate of 2*s.* or under per ton, and this is an increase of more than 5 per cent. on all rates of a less amount than 1*s.* 8*d.* The scale, however, was, the respondents state, so contrived because they believe the cost of working short-distance traffic to be more than the cost of working other traffic. The traffic sent from the pits of Taylor & Co. and Messrs. Black and Sons, on the Glasgow and South-Western system, is short-distance traffic. Nearly the total output of those pits goes to Ayr harbour for shipment, and the railway company calculate the cost of dealing with it to be 8*d.* per ton more in 1899 than in 1892. No such increase appears in the relative cost per ton of their total mineral traffic, as extracted from their books and half-yearly reports, which is 6·79*d.* in 1892, and 6·25*d.* in 1899. Most of the 8*d.* per ton is the charge for extra work done by engines and shunters in Ayr harbour, and required, it is said, through coal being now shipped in steamers instead of as before in sailing vessels. The applicants, however, deny that any such increase as is alleged has taken place in the engine power required to shunt their traffic at Ayr. Whether it will be necessary to determine this particular case will depend upon how the general question is disposed of.

Now as to these figures and the increase of cost suggested by them, the contention on the part of the coalmasters is : 1st, that no statement of expenses resting on mere estimated amounts can be satisfactory, or ought to be accepted, and that it is the fault of the respondents, in view of the ample time they have had since the passing of the Act of 1894 to prepare more detailed forms, if their books, as still kept, contain no apportionment of expenses or mileage between the different branches of traffic, passengers, goods, and minerals—nor as to the last-named of the three any distinction between coal and other minerals ; and 2nd, that cost per train mile is no sure guide for showing the relative expense of working traffic at different periods, and that

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by heavier train loads, larger wagons, and other ways, cost per ton may decrease with no corresponding decline in cost per train mile; and, lastly and chiefly, that the wagon load is not a means by which gross mileage can be correctly apportioned between the different classes of traffic. They point out, as regards the wagon load, that in 1900, on the wagon-load basis, the North British are given a mileage of 4,864,920 miles for a mineral tonnage of 19,012,320 tons, whereas the Caledonian company, who keep a record of their actual mineral mileage, carried 20,068,985 tons in that year, and only ran 2,937,689 mineral train miles in doing so, and that while the North British are thus given a mineral mileage relatively to tonnage so very much greater than the Caledonian require, it is just the reverse with their goods traffic, for that as to this traffic the North British carry 4,757,378 tons for a mileage apportioned by wagon load of 3,910,188 miles, and the Caledonian company 4,628,790 tons for an actual mileage of 4,651,678 miles. Why these two companies should so differ in their mode of working each of these kinds of traffic is not explained, and it certainly seems as if the apportionment of North British mileage between goods and minerals has given too much of it to the mineral and too little to the goods traffic. That an apportionment on this basis applied to the Caledonian goods and mineral mileage would have that effect is beyond doubt. It would reduce their goods mileage to 2,868,770 miles, and raise that of their minerals to 4,710,597, and make the proportion of the two mileages the reverse of what it actually is. It corroborates this view, that on the test day of 18th October, 1900, when an account was kept of the North British mineral trains actually run on that day, the miles done were only 10,176, which taken as an average daily run and multiplied by the number of working days in the year would give a total for the year of about 3,050,000, a number far short of the 4,864,920 computed miles, and little exceeding the 2,937,689 actual mileage of the Caledonian company, while, as opposed to this, the goods train mileage of the North British, which for the year is reckoned on the wagon-load basis as 3,910,188 miles, was, according to the test day return, not less

than 6,000,000, the wagon-load goods mileage for the year working out at some 18,000 a day, as against 19,775, the goods mileage of the test day. The two ways in which the respondents measure mileage give inconsistent results, and it would seem therefore that it would not be safe to build much upon the cost per train mile as worked out by the respondents, the train mileage attributed to coal being almost certainly in excess of its real mileage. It is the same with the shunting mileage, which the respondents divide between goods and minerals in ratio of their train mileage, and therefore if a division by train mileage would debit coal with more than its due proportion of a cost, a division in ratio of train and shunting mileage, which is the mode of dividing the expense for maintenance of way, would increase the inequality. As to the increase of 7·43*d.* in the cost per train mile on the Caledonian for 1899 as compared with 1892, this appears to arise in great measure from increase of shunting engine mileage. Although the coal tonnage carried by the Caledonian company rose from 10,845,408 tons in 1892 to 13,464,928 tons in 1899, there was no increase of train mileage: the train miles were 1,980,080 in 1892 and 1,983,230 in 1899. But the shunting mileage increased nearly 50 per cent., or from 1,815,911 miles in 1892 to 2,697,720 in 1899, and this increased the charge against coal for maintenance of way, and also for locomotive power, for while the locomotive cost per train mile only increased for passengers from 6·10*d.* in 1892 to 7·11*d.* in 1899, and for goods from 9·05 to 10·59, it increased for minerals from 10·90 to 15·85, the work performed in shunting interfering with and reducing the mileage done by the mineral engines on the running lines. But the increase in the amount of shunting is caused by the demand for increased facilities for the passenger train service; and though this altered condition of things for slow traffic cannot be helped, it does not follow that the extra cost involved in it should be all paid for out of an increase of rate on the traffic which is not the one for whose immediate benefit it has been brought about.

Another way, and in the opinion of the applicants the sound way, of testing whether the cost of working coal has gone up, is

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to take the relation of cost to receipts. This has been done by both parties. But as the books kept by the respondents give only the cost for all traffic, this total cost has to be divided between its several heads. In the amount that should be allocated to passengers on the one hand, and goods and minerals on the other (I am referring now to the North British), there is not much that the parties differ about. Their methods of allocation, indeed, not being the same, they divide some leading items differently, but in the result each divides the total cost of working in about the same proportion between the passenger traffic and the goods and mineral traffic. The amount of the goods and mineral proportion is then further divided by the North British between goods, coal, and other minerals, and the percentage to coal receipts of their estimated expenditure on coal traffic is put as being 46·62 in 1892, and 48·34 in 1899. The percentage, on the other hand, of goods and mineral expenses to goods and mineral receipts shows a decrease, the figures, according to the North British tables, being 49·9 in 1892, and 48·8 in 1899, and minerals being the less costly of the two classes of traffic to work, if goods and minerals together fall as against receipts, the fall would be greater in the mineral part than in the other. Whether, nevertheless, the coal percentage did in reality increase depends on how expenses have been apportioned, and on this point there is ground, as appears by what has been already said, for holding that the respondents' method of apportionment tends to throw on coal to the relief of goods a larger share of the expenses than is due to the coal traffic. The amount of the expenses is apportioned on a train-mile (wagon-load) basis, and this, it has been shown, transfers to mineral mileage, mileage that is properly applicable to goods. The applicants, for their part, do not attempt to make any separation between goods and minerals, no information to be obtained from the companies' books enabling them to do so, but they take the goods and mineral expenses as they find them and measure their proportion to receipts, and the percentage, according to their calculation, is 52·97 in 1892 and 50·56 in 1899, a decrease of 2·4, or rather more than the decrease shown in the respondents' tables. As regards the Caledonian

company, the ratio of coal expenses as apportioned by them rose from 39·07 of coal receipts in 1892 to 48·55 in 1899, an increase of 4·48 per cent., while of goods and minerals together the increase was 3·1 per cent., which is reduced by the applicants, according to their apportionment, to 1·9. The way in which the Caledonian company divide expenses, and the increase of shunting engine mileage, account for a good deal of the increase, but the price to which coal had already risen in 1899 was not without effect on the relation of expenses to receipts, the average price per ton paid by the three companies in 1899 being 7s. 5·11d. as against 6s. 4·59d. in 1892, or 1s. a ton more. Looking, however, to the figures of the North British, the deduction, I think, may be drawn that there was no material increase in 1899 as compared with 1892 in the proportion per cent. of coal or mineral receipts which was expended in working.

The North British company, and, in a less degree, the Caledonian, have since 1892 expended certain sums out of capital in improving their lines and harbours, and in adding to their stock of engines and wagons. Part of this expenditure has been for mineral traffic, either to meet increase in its tonnage since 1892 or to render the working of it cheaper and more efficient, and on the plea that the amount charged as being for the latter purpose, and calculated at a million, must have decreased cost of working, it is urged that in comparing 1899 with 1892, a sum equal to interest at 5 per cent. on the outlay on capital account should be added to the actual working expenses of 1899. But we have, I think, no sufficient evidence as to the bearing of this outlay on the working expenses of 1899, or that the amount by which facilities provided have reduced cost of working is rightly debited. It is no doubt an economy and a saving of expense in working North British traffic that the increase in the number of company's wagons on that railway available for coal traffic has been greater in proportion than the increase of traffic, but the coalmasters or the public are not responsible for expenses due to deficiencies in the supply of company's wagons, as the Scotch Acts contemplate that trucks shall be provided by the companies. Relief lines and extra siding accommodation are a principal item in the

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capital outlay, but the mineral traffic of the North British was one-third more in 1899 than 1892, and there is nothing to show that the additional works are more than are required to secure for the larger quantity of traffic facilities in transit equal to those which were at the service of the smaller quantity. Moreover, they were not unconnected with the necessities of the passenger traffic, and where, in order that fast traffic may run at better speed and proceed without interruption, lengths of separate mineral-carrying rails and loop lines are provided, it would seem reasonable that there should be a distribution of their cost, and that the cost should not be all treated as incidental to the mineral traffic and as making out a case for the raising of its rates.

The Act of 1894 casts upon the respondents the onus of showing that the increase of rate is reasonable, and upon the whole it seems to me that the evidence they have given bearing on the cost of working has not proved that when the coal rates were raised at the end of 1899 the cost of carrying that traffic showed such an advance upon the cost in previous years as to require or justify the raising of the rates. There was, it is true, the likelihood that the price of locomotive coal would rise very much in 1900, and the figure to which it did rise in the latter half of that year, and the extent to which the rise affected the cost of working, might have made an increase of the rates while it lasted reasonable enough. But to justify a permanent increase of rate, changes affecting only temporarily cost of working are not sufficient, and coal is an item of expenditure as to which experience has shown that high prices do not last, and already in June of this year, when this case was heard, the price had fallen very considerably, and was scarcely more than half of what it had been.

There is a claim for damages under the enactment which provides that we may award damages where, as in the present case, complaint is made within the prescribed time. The claim has reference to coal sent by rail at the higher charge, and the coal so sent would almost all have been either for land-sale or for shipment abroad; and as to the former it may be presumed that those with whom the applicants have dealt would, except

where contracts existed, pay carriage according to the rate for the time being, and the applicants sustain no damage. Similarly where the coal has been sent to a port for shipment, the railway rate from the pit would, in the usual course, be borne by the customer or consumer abroad. The applicants, however, state that the addition to the rate has, notwithstanding, fallen altogether upon themselves, the coal they export competing with coal sent from English or Welsh ports. On the other hand, there is the higher price at which the applicants' coal has been sold, and we should need an inquiry to be in a position to say that the increased cost of delivery has not been included in the value of the coal and in the price charged to the buyer.

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LORD COBHAM: The main question which the Court has to settle in this case is whether an increase in the coal rates charged to the applicants by the three defendant companies which took effect on and after 1st January, 1900, was reasonable or not. There is no dispute as to the fact of the increase, and the onus of justifying it falls upon the railway companies. They base their defence exclusively upon an increase in the cost of carrying the applicants' coal, which increase, they say, has taken place in recent years, and justifies the increase of the rates charged. The defendants having elected to adopt this line of defence, we are, I apprehend, confined in our inquiry to the issues thus narrowed, and the applicants are entitled to succeed if they can displace or even throw substantial doubt upon the case presented by their opponents.

The expert witnesses for the applicants have in the first place endeavoured to show that the railway companies' figures—those, that is to say, taken direct from their books, and not based on estimate—point to the conclusion that, so far as there is an increase in the cost of working their general traffic, it should be debited to passengers and not to the coal traffic. Secondly, they criticise the methods adopted by the companies to ascertain the mileage of their coal traffic, and the due apportionment to that traffic of its share in locomotive and other expenditure, and they show some remarkable discrepancies in the results thus ascertained, both *inter se* and with actual figures. I agree with

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the view that, whether these witnesses have established their conclusions or not, they have thrown considerable doubt on those of the companies.

The defendants contend that they have proved their case by showing as regards their coal traffic, an increased cost per train mile, and also an increased ratio of expenditure to receipts, between the two periods taken for comparison. It is, I think, worth while to examine this contention, accepting for the sake of argument the figures submitted to us by the companies. Of the four years for which we have the figures worked out in detail, I have taken 1892 and 1899 as the least open to exception. First, as to the cost per train mile. This, of course, depends upon two factors, the expenditure and the train mileage; thus an increase in it may be due either to increased expenditure or decreased mileage. The companies in this case seem to have taken no account of the latter alternative. But, according to their own figures (I am dealing now only with these two companies), the North British in 1899 carried $26\frac{1}{2}$ per cent. more tonnage over a mileage increased only by $12\frac{1}{2}$ per cent. as compared with 1892, while the Caledonian actually carried $24\frac{1}{2}$ per cent. more tonnage without appreciably increasing their mileage at all. As might have been expected under such circumstances, the cost per ton has shown no increase in the case of either company, and it would no doubt have decreased but for the increased cost of labour, fuel, &c., of which we have had evidence. The assumption that under these conditions the increase of cost per train mile denotes increased cost of working is quite untenable, and the only course open to the companies in the face of these facts would have been to show that the applicants' traffic was quite exceptional in its character, and that the above considerations were inapplicable to it. No attempt, however, has been made to do this. The large saving in mileage was not due to a falling-off of traffic, nor has evidence been brought to show that the short-distance traffic of the companies has increased relatively to the long-distance traffic. The only other explanation that seems to be available, and which is not inconsistent with the evidence, is that the reduced mileage has been largely brought about by the use of more powerful engines, larger wagons, and

generally by improved methods of working, such as we might expect to see introduced on progressive railway systems during the course of seven years. This indeed is admitted by Mr. Jackson, speaking for the North British, when he says that the increase in the train mileage in 1900 over 1892 was so much less in proportion to the increase in the coal tonnage, because they were using larger wagons which they had provided between the two years. If it be once admitted that increased cost per train mile may be due to mileage saved by more economical working, its deceptiveness as a proof of increased actual cost becomes apparent. This is well shown by the figures of the Caledonian and North British companies for 1899. The two companies carried nearly the same tonnage of coal, but the Caledonian running less than two million miles as against three-and-a-half million miles run by the North British, their expenditure was only 354,000*l.* against 450,000*l.* spent by the North British; that is 6*·*3*d.* against 8*d.* per ton, while their cost per train mile was 42*·*9*d.* against the North British 30*·*1*d.* In other words, a much larger cost per train mile is here associated with a less cost per ton.

A similar criticism may be made upon the use by the defendants of the ratio test. It seems to be assumed that the ratio of coal traffic expenditure to receipts has risen because expenditure has risen, and not because receipts have fallen. In the case of the Caledonian the ratio has risen between 1892 and 1889 from 39*·*1 to 43*·*5 per cent. But the fact that the cost per ton has remained the same, or nearly so, should have suggested that the cause of the increase in the ratio should be looked for on the receipts side. There we find that there has been a heavy falling-off relatively to tonnage. Receipts from coal were 813,770*l.* in 1899, or about 181,000*l.* less than they would have been had they increased in proportion to the tonnage. The relative reduction of receipts on the North British is much smaller, but it is sufficient, as in the case of the Caledonian, to account for its increased ratio.

There is yet another test, that of the cost per ton, which if duly supported by evidence might perhaps have brought out results more favourable to the companies. So far, however, as I am able to judge from the materials before me, I doubt if this

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would have been the case. It is of course difficult to compare the conditions of the carriage of a ton of coal in 1892 with those existing in 1899. We know, however, that according to the companies' figures, the cost of carrying their coal traffic increased in proportion to the tonnage, and no more ; and there is, I think, a certain presumption that what is true of the whole traffic is true of a substantial fraction of it. But no attempt has been made to displace this presumption, or to show that special causes existed in 1899 tending to raise the cost of the applicants' traffic above the general average. Whether then the three tests are applied singly or collectively, so far from establishing the companies' case, they appear to me to be entirely consistent with the contrary view, that the cost of carrying their coal traffic has remained substantially constant. Probabilities, as the Dean of Faculty urged, may point the other way, but the companies are bound by the figures they produce, and from them alone my conclusions have been deduced.

The North British company say that since 1892 they have spent a capital sum of 1,000,000*l.* for the purposes of their coal traffic, and they claim to debit that traffic with the charge thus incurred, or rather, as they put it, with the amount of working expenses saved in 1899 by means of this outlay. They do this by adding 5 per cent., or 50,000*l.*, to the expenditure of that year, ignoring all capital expenditure for which a similar charge might have been made in 1892. But if such an item is admissible at all, it ought, I think, to be introduced in the same way as any other item of expenditure, viz., the amount chargeable in 1899 should be compared with that chargeable in 1892. This would, no doubt, have involved a laborious investigation ; but it is the only way by which we can ascertain the increase or the decrease of the charge for capital per ton of the traffic. It seems to me very probable that the tonnage has increased since 1892 in a greater proportion than the capital, in which case, of course the charge per ton in 1899 would now be less, and not more than in 1892.

The figures of the Glasgow and South-Western are very different from those of the others, and if they could be relied upon, they would go far to prove their case. Taking Mr.

Guthrie's figures for the coal tonnage, it was about 8,000,000 in 1892, and about 10,000 tons less in 1899, the mileage remaining very much the same. The expenditure, however, rose by more than 21 per cent., and the cost per ton, of course, a corresponding amount. But it would, I think, be unsafe to accept these figures, based as they are upon very similar data to those adopted by the other two companies, and which we have given our reasons for mistrusting. Further, without explanations which I cannot find in the evidence or tables, it is difficult to regard as in any way probable some of the results brought out by the Glasgow and South-Western calculations. For instance, why should this company be the only one unable to economise in its mileage, the Caledonian saving, relatively to tonnage, no less than 24 per cent. of theirs? Then the Glasgow and South-Western cost per ton of coal has increased from 1s. 2½d. to 1s. 6d., although the other two companies show if anything, a slight decrease. Again, the South-Western coal receipts have risen from 179,000l. to 230,000l., and that with a decreasing tonnage, while the other companies show relative decreases in receipts—in the case of the Caledonian a very large one. Methods substantially the same, which in the case of these neighbouring railway systems bring out such contradictory results, cannot be taken as a safe foundation for the case which the railway company has undertaken to establish.

As to the applications of Messrs. Black and Sons, and Taylor & Co., and upon the general question of damages, I agree with the views expressed by my colleagues.

LORD STORMONT DARLING: I agree that the respondents have failed to discharge the onus resting upon them under the Act of 1894, in the only way by which they have sought to discharge it, that is to say, by showing that there has been such an increase in the cost of carrying their coal traffic since 1892 as to make the increase of the rates complained of a reasonable increase. It is admitted, and, if it were not admitted, I think it is clear that increase of cost, to have this effect, must apply to the particular service, and that it must be due to causes which

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are not merely transitory in character. I take the case entirely on the figures presented for our consideration by the respondents, and these seem to me to be founded upon estimates and calculations which are entirely unconvincing.

The first part of the order to be pronounced under these applications will have the effect of requiring the respondents to desist from charging these increased rates for the future. But the applicants also ask, under section 12 of the Act of 1888, for an inquiry into the damages sustained by them in consequence of their having been compelled to pay these increased rates since 1st January, 1900. We shall order such an inquiry to be taken before the Registrar in the ordinary way, but it will be open to the respondents in that inquiry to show, by any competent evidence, that damages have not been sustained by the applicants, and in particular, that the increased rates have been, in whole or in part, truly borne by other persons.

[Solicitors for the applicants: *Drummond and Reid.*

Solicitor for the Caledonian railway company: *H. B. Neave.*

Solicitor for the North British railway company: *James Watson.*

Solicitors for the Glasgow and South-Western railway company: *Maclay, Murray, and Spens.*]

FAIRWEATHER & CO. AND OTHERS

v.

CORPORATION OF YORK⁽¹⁾.

Undue Preference—Canal Tolls—Rebats under Special Agreement—Considerations Affecting the Case—Jurisdiction—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27.

Section 27, sub-section 2, of the Railway and Canal Traffic Act, 1888, enacts:—"In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, . . . the Commissioners . . . may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant . . ."

November 6,
1900.

The applicants, corn millers and merchants at York, in the course of their business brought cargoes of wheat up the river Ouse to York. They complained that the respondents (as trustees for improving the navigation of the river Ouse) charged Messrs. L., flour millers and corn merchants at York (competitors in trade with the applicants), a sum by way of toll for the use of the river Ouse navigation, within the jurisdiction of the respondents, which worked out to a payment of about 1½d. per ton on wheat brought up the river Ouse to Messrs. L.'s works at York, and charged the applicants for similar traffic brought up the river Ouse to the applicants' works at York tolls for the use of such navigation amounting to 6d. per ton.

By an agreement dated 1st of October, 1888, and made between the respondents and Messrs. L., the respondents agreed to accept a maximum annual payment of 600*l.* from the said firm, in place of the tolls which would otherwise have been payable, for the whole of the wheat brought by them over that part of the river Ouse navigation which is within the respondents' jurisdiction, irrespective of the amount of the tonnage which might use the said navigation.

The respondents sought to justify the agreement on the ground that at the date it was entered into Messrs. L. contemplated transferring their business to Hull, which would have seriously diminished the tolls and would even have imperilled the maintenance of the navigation, and that such a removal would also have caused a serious loss to the ratepayers of the city, and,

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

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moreover, that Messrs. L.'s business had increased to a far greater extent than was contemplated when the agreements were entered into.

Held, that, after taking into consideration these and other matters, the difference in the amount charged to Messrs. L. and to the applicants for the use of the river Ouse navigation in connection with the conveyance of wheat was an undue preference given to Messrs. L. over the applicants.

THIS was an application under section 2 of the Railway and Canal Traffic Act, 1854. The application, so far as material, was as follows :—

“ The applicants, Messrs. Thomas Mills, Fairweather & Co., Limited, have carried on business as corn millers and merchants at York since 1st March, 1898, and for some years before that date the applicants, Messrs. Thomas Mills & Co. and Messrs. J. T. and S. Fairweather, carried on the same business as separate firms. The respondents are the trustees for improving the navigation of the river Ouse, acting under the powers of certain special Acts of Parliament, and under the Canal Tolls and Charges No. 7 (River Ancholme, &c.) Order Confirmation Act, 1894, they are empowered to charge certain tolls for the use of the said navigation. In the course of their business the applicants have brought cargoes of wheat up the river Ouse from Hull, and have been required to pay and have paid the respondents tolls for the use of the Ouse navigation within the jurisdiction of the respondents amounting to 6*d.* per ton. By an agreement dated 1st of October, 1888, and made between the respondents of the one part and the firm of Henry Leetham and Sons, flour millers and corn merchants at York, of the other part (hereinafter called the said firm), the respondents agreed to accept a maximum annual payment of 600*l.* from the said firm in place of the tolls which would otherwise have been payable for the whole of the wheat brought by them over that part of the river Ouse navigation which is within the respondents' jurisdiction irrespective of the amount of the tonnage which might use the said navigation. The result of the said agreement is that the toll charged by the respondents to the said firm is about 1½*d.* per ton as compared with 6*d.* charged to the applicants for the same services and the use of the same conveniences, a disparity of charge which has seriously prejudiced the applicants in their competition with the said firm. The respondents do not incur

any greater expense per ton in dealing with the applicants' traffic than in dealing with that of the said firm, and the applicants submit that the effect of the said agreement is to constitute an undue or unreasonable preference or advantage to or in favour of the said firm and their traffic, and to subject the applicants and their traffic to an undue or unreasonable disadvantage, and the applicants have suffered damages in consequence."

The answer of the respondents, so far as material, was as follows:—

"The respondents say that the following is a short summary of the statutes relating to the Ouse and to which they will refer.

13 Geo. I. c. 33. The preamble of this statute stated that the river Ouse had become less navigable and passable, which was not only detrimental to trade and the public good and prejudicial to the said city, but to all traders thereto and to the owners and occupiers near there and to . . . 'For remedy whereof and to the intent that the said river, as well for the good of the public in general and of the inhabitants of the said city, as also of such as shall trade and pass thither and from thence with merchandise, may be effectually repaired, amended, maintained and improved'

It was enacted that the persons therein mentioned should be trustees for putting in execution the powers conferred by the said Act and for making navigable the river Ouse, including amongst other powers the following—The execution of works for the proper navigation of the river, toll and rate powers for the purpose of making and keeping the river and works navigable and useful, and to borrow money on the security of the profits arising from such tolls. Such toll and rate powers being limited to the river above Wharfmouth, being about 11 miles distant from York.

5 Geo. II. c. 18. This Act conferred fresh powers on the trustees with respect to the levying of tolls and borrowing of money on the security of the profits arising therefrom.

47 & 48 Vict. c. 161 (Ouse Lower Improvement Act, 1884). The effect of this Act (sections 3 and 100) was to shorten

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the length of the river over which the corporation had jurisdiction.

The Canal Tolls and Charges No. 7 (River Ancholme, &c.) Order Confirmation Act, 1894, prescribed the maximum tolls, charges, &c., which the corporation were entitled to charge in respect of the Ouse navigation.

By the Municipal Corporations Act, 1882 (section 134), the respondents were constituted trustees for executing by the council the powers and provisions of the above-mentioned statutes of Geo. I. and Geo. II.

The respondents are the owners and have the management and control of the river Foss from its junction with the river Ouse to a point about 200 yards above the York Union Workhouse under the following statutes—

33 Geo. III. c. 99. This statute empowered the Foss navigation company to make the river navigable from its junction with the river Ouse to Stillington mill and to execute a number of works necessary for that purpose.

The statute conferred powers upon the company to charge rates and other charges in respect of goods carried on the said navigation and also to borrow money upon the security of the property of the said navigation and rates.

41 Geo. III. c. 115. This statute authorised the company to discontinue their working above Sheriff Hutton Bridge and conferred upon it power to charge further rates in certain cases.

York Drainage and Sanitary Improvement Act, 1853. Under and by virtue of this Act, the navigation the property of the company and all powers of the company with respect to tolls, rates, &c., became vested in the corporation, and the corporation were empowered (section 48) to levy a rate, to be called the sanitary improvement rate, for the purpose of carrying into effect the powers by the said Act vested in the corporation.

22 Vict. c. 19. This statute authorised the corporation to discontinue the navigation at a point about 200 yards above the York Union Workhouse.

The Canal Tolls and Charges No. 7 (River Ancholme, &c.) Order Confirmation Act, 1894, prescribed the maximum tolls,

charges, &c., which the corporation were entitled to charge in respect of the Foss Navigation.

The respondents say that the following table correctly shows the traffic of the applicants and the tolls paid by them during the period referred to.

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Date.	Name.	Tonnage through Ouse.		Dues paid Corporation.		
1896 Mar. 1 to 1897 Feb. 28	Thos. Mills & Co.	T.	C.	£	s.	d.
		7,386	5	184	14	3
	J. T. and S. Fairweather	8,040	15	201	0	5½
		15,427	0	385	14	8½
1897 Mar. 1 to 1898 Feb. 28	Thos. Mills & Co.	5,138	3	128	11	9
	J. T. and S. Fairweather	6,052	5	150	18	6
		11,190	8	279	10	3
1898 Mar. 1 to „ Sept. 30	Thos. Mills, Fairweather & Co., Ltd. ...	6,307	15	157	13	10½
1898 Oct. 1 to 1899 Sept. 30	Thos. Mills, Fairweather & Co., Ltd. ...	10,335	5	248	13	2

The respondents state that on the 10th October, 1888, they entered into two agreements with Henry Leetham, Sydney Leetham, Herbert Leetham, and Henry Ernest Leetham, all of the city of York, carrying on business as flour millers and corn merchants under the style of Henry Leetham and Sons, at their mills in Hungate, adjoining the river Foss below Monk Bridge, and being about half a mile from the junction of the Foss with the river Ouse.

The respondents entered into one of such agreements as the trustees to execute the Acts of Parliament above referred to. Such agreement related in particular to the river Ouse and the traffic of Messrs. Leetham thereon, and the tolls payable by them in respect thereof, and is hereinafter referred to as the Ouse agreement.

The respondents entered into the other agreement as being the owners of, and as having the management and control of the

1900. navigation of the river Foss under the Acts of Parliament
FAIRWEATHER above referred to from its confluence with the river Ouse in
& Co. the city of York to a point about 200 yards above the York
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Such agreement related in particular to the river Foss and the traffic of Messrs. Leethams thereon, and the tolls payable by them in respect thereof, and is hereinafter referred to as the Foss agreement.

The position in 1888, when the agreements were entered into, was as follows:—Messrs. Leetham were by far the largest traders on the rivers Ouse and Foss. In addition to the tolls and rates paid by them in respect of the navigation the firm also paid a large amount in city rates in respect of their works, and the individual members of the firm were also large city ratepayers.

The old lock on the Foss was too small to allow Messrs. Leetham's barges to pass through to their works, and consequently the bulk of the wheat destined for their mills had to be landed at a public wharf on the river Ouse, from which it was thence carted through the streets of the city to their mills.

The cartage necessarily caused expense and inconvenience to Messrs. Leetham in carrying on their business, and as regards the corporation the cartage occasioned immense wear and tear to the streets, and consequent expense to the corporation in maintaining them.

In 1888 Messrs. Leetham, in these circumstances, were desirous of extending their business, and the question with them was whether they should build new premises at Hungate or transfer their business altogether to Hull.

In the latter case, their removal to Hull would have been a serious loss to both navigations in the matter of tolls and also to their maintenance, the corporation having no power to maintain the Ouse navigation out of any city rate or fund. The removal of their business to Hull would also have caused a serious loss to the ratepayers of the city.

Ultimately Messrs. Leetham agreed with the corporation to build new works at Hungate upon terms which were embodied

in the said two agreements, which may be summarised as follows:—

Foss Agreement.—The corporation to make a new lock to maintain a water channel by dredging between the lock and Messrs. Leetham's mill, to lay down a pump and engine near the new lock for pumping water into the lock. Such works involving an expenditure of 4,524*l.* as estimated in the agreement.

Messrs. Leetham to erect a corn mill, warehouse, and silo at a cost of not less than 10,000*l.* So long as the Hungate mills are not permanently abandoned for the manufacture of flour, the corporation to allow Messrs. Leetham the use of the Foss navigation for goods used by them in the ordinary course of their business as corn millers and corn merchants on payment by Messrs. Leetham, in lieu of dues, of 200*l.* per annum by quarterly instalments. Messrs. Leetham guarantee such payment for 20 years, and the corporation to extend such period for such further time as Messrs. Leetham desire.

The corporation may determine the agreement if Messrs. Leetham make default for three months after notice in writing that any quarterly instalment is overdue, or if Messrs. Leetham fail to comply with any conditions of the agreement, or if they the corporation determine the Ouse agreement.

Ouse Agreement.—The corporation to allow Messrs. Leetham to carry cargoes over the Ouse for the ordinary purposes of their trade as flour millers and corn merchants on payment by Messrs. Leetham, in lieu of dues, of 600*l.* per annum by quarterly payment, but if the ordinary dues on their traffic on the Ouse in any one year do not amount to 600*l.* then the difference between such 600*l.* and the ordinary dues is to be refunded to Messrs. Leetham.

The corporation may determine the agreement if they, the corporation, determine the Foss agreement, or if Messrs. Leetham make default for three months after notice that any quarterly instalment is overdue.

Pursuant to the said agreements the corporation made the new lock and works at a cost of about 8,700*l.*, which exceeded the cost as estimated in the agreement, and Messrs. Leetham erected the new mill and works at a cost of over 50,000*l.*

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Before these agreements were entered into the corporation were charging Messrs. Leetham the same dues as other traders on the Ouse and Foss, that is to say—

OUSE.

Up river ...	Grain	6d. per ton for the whole distance.		
	Coal	2d.	do.	do.
Down river...	Flour,			
	Bran, and	3d.	do.	do.
	Sharps			

Foss.

Up river ...	Grain and coal	3d. per ton for the whole distance.
Down cargoes	1½d.	do. do.

After the completion of Messrs. Leetham's mill and works and of the river works which the respondents had undertaken to construct, Messrs. Leetham's business increased to a far greater extent than contemplated by the respondents when the agreements were entered into.

The following table shows approximately the state of affairs before and after the completion of the mills and works:—

OUSE NAVIGATION.

LEETHAM'S ANNUAL TONNAGE OF THE OUSE.			LEETHAM'S ANNUAL PAYMENT FOR DUES.		
Before the 1888 agreement.	Present Time.	Before the 1888 agreement.	Present time under terms of agreement.	Amount now payable if Messrs. Leetham paid same rates as other traders.	
Coal up ... Tons 497 Corn up ... 26,557 " down 552 Total ... 27,606	Coal up ... Tons 10,412 Corn up ... 94,967 " down 11,146 Total ... 116,525	Coal up ... £ 4 Corn up ... 664 Down ... 7 £675	£600	Coal up at 2d. ... £ 87 Corn up at 6d. ... 2,374 " down at 3d. ... 139 £2,600	
FOSS NAVIGATION.					
Coal up) 3,360 Corn up) " down)	Coal up ... 10,055 Corn up ... 91,719 " down 11,986 113,760	Coal up) £42 Corn up) " down)	£200	Coal up at 3d. ... £ 126 Corn up at 3d. ... 1,146 " down at 1½d. ... 75 £1,347	

As appears by the table before the agreements, Messrs. Leetham paid the respondents in respect of Ouse dues about 675*l.* per annum, as against 600*l.* per annum which, under the

said agreements, they would have to pay in the future, and in respect of Foss dues the sum payable by them before the agreements was about 42*l.* per annum as against 200*l.* per annum which, under the agreements, they would have to pay in the future.

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The respondents admit that, dividing Messrs. Leetham's present large wheat tonnage by the annual sum of 600*l.* payable by them under the Ouse agreement, it works out at about 1½*d.* per ton, as compared with 6*d.* per ton charged to the applicants for the carriage of their wheat, but they do not admit that the said charges are for the same services or for the use of the same conveniences.

The respondents further say that they are enabled to work Messrs. Leetham's traffic more cheaply and expeditiously than that of the applicants.

The respondents deny that the said agreement constitutes an undue or unreasonable prejudice or preference to or in favour of the said firm or their traffic, or that it subjects the applicants and their traffic to an undue and unreasonable disadvantage, or that they have suffered damage as alleged.

The respondents contend that in entering into the said agreements they did so under and in pursuance of the statutes hereinbefore mentioned, and that the transaction between them and Messrs. Leetham, to give effect to which the said agreements were entered into, was for the good of the inhabitants of the city of York and of the traders using the river Ouse, and that had it not been carried out the Ouse navigation would have been seriously impaired, not only to detriment of trade and the public good and prejudicial to the city, but to all traders thereto and to the owners and occupiers near thereunto.

The respondents further say that it was only by entering into the said agreements that the traffic of Messrs. Leetham could have been secured in the interest of the public and the said river."

C. A. Russell, Q.C. (Harold Russell with him), for the applicants.

As trustees of the navigation, the Corporation of York are

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subject to the restrictions contained in the Traffic Acts since 1854, and they may not plead as justification that the preferred trader is a York trader, and that his loss would affect the corporation. There is nothing to show that if Messrs. Leetham had left York, a share of their traffic would not have gone to the applicants or some other firm. There is no danger here of Messrs. Leetham's traffic being driven out of York, as was the case in *Liverpool Corn Traders' Association v. Great Western Railway Company* ⁽¹⁾; the question is, on what terms other traders are to come into York.

Sir Robert Reid, Q.C. (Sutton with him), for the Corporation of York.

It is questionable whether this is an undue preference, as 50 per cent. of applicants' trade is in York, whereas only 5 per cent. of the whole of Messrs. Leetham's business is in York; and they must be put as far as possible on the level of the port of Hull, with which they have to compete. He cited *Pickering, Phipps, and Others v. London and North-Western Railway Company* ⁽²⁾. There are only two courses open—(1) to vary Messrs. Leetham's agreement, for which the corporation had full consideration, and it would be unreasonable to impose this on the corporation; or (2) to lessen the applicants' rate to $1\frac{1}{2}d.$ per ton, in which case the present annual profit of 600*l.* will become a deficit, and it will be impossible to carry on the navigation.

The judgment of the Court was delivered by Mr. Justice Wright.

WRIGHT, J.: This is a case of very great difficulty, which we cannot deal with upon any very clear principle. The agreement with Messrs. Leetham, no doubt, was perfectly *bond fide*—made in the interests of the locality, with a certain amount of not undue consideration for the interests of the corporation in other ways. But the agreements with Messrs. Leetham were

⁽¹⁾ *Ante*, Vol. VIII. 114.

⁽²⁾ *Ante*, Vol. VIII. 83.

not made on grounds which could altogether commend themselves to the approval of a tribunal like this, and, having considered the matter as anxiously as we can, we have come to the conclusion that it is impossible to hold that there is not an undue preference in this case.

Before the Act of 1888 we should have been obliged by the Parliamentary enactments then in force not merely to hold that there was an undue preference, but to disregard nearly every consideration except one, and that is, whether the difference in charge could be justified by differences in the way in which the traffic of one firm as compared with that of another had to be conducted, or differences affecting profit received from the traffic, as, for instance, if there were greater quantities sent by one person in consideration of a lower price, or things of that kind connected with the traffic itself. Now we are much more at large. Under the Act of 1888, section 27, under which we are proceeding, we are to consider not merely the matters which we could have considered before, but also the public interest, and in the public interest we may take into consideration that the existence of this traffic at York tends to some extent to give the public the benefit of a competition with the millers at Hull and other places. We are further, under the language of the section, to take into consideration "any other considerations affecting the case," words as wide as possible. Now I think we can "take into consideration," with reference to that, such matters as that, but for these agreements, Messrs. Leetham would have removed from the district and thus have deprived the district of a valuable local industry, and the corporation of 600*l.* a year, or some part of it. I do not think there is any limit to the things we may "take into consideration," although any one of them standing by itself might be of the smallest weight in the scale. They are all matters, in the language of Lord Herschell in the *Pickering, Phipps Case*⁽¹⁾, to take into consideration as far as we think fit.

Taking into consideration all the matters we can, we still cannot come to the conclusion that there is anything which at all justifies the difference between the 6*d.* and the 1½*d.* on corn.

(1) *Ante*, Vol. VIII. 83.

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FAIRWEATHER
& Co.
AND OTHERS
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CORPORATION
OF YORK.
Wright, J.

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The Agreements with Messrs. Leetham do not in any way provide that the corporation should have the benefit of any increase of traffic produced by the lowering of the traffic rate. If the traffic increases a thousandfold the corporation are not to get a penny benefit beyond their 600*l.*, whereas, on the other hand, if the traffic falls off they do not even get the benefit of the fixed sum; the payment will be reduced below 600*l.* unless there is sufficient traffic to make up that sum. So on every ground we think the preference cannot be justified, but at the same time we think we are at liberty to "take into consideration" every circumstance affecting the case in seeing what the alterations ought to be. At present it is not our duty to prescribe what the reduction should be, and it is not our duty to say whether the corporation must try to get rid of the agreements with Messrs. Leetham, or whether the corporation must reduce the dues as charged against the applicants. All we can do now is to indicate what, in our opinion, might for the time be a reasonable experimental way of dealing with the case, leaving it to the parties either to give effect to that suggestion or to come here and fight out the question of what the exact form of relief should be. In deciding what to suggest to the parties as a fair sort of compromise we are guided very much by those words later on in the section, that the Commissioners are to take into consideration "whether the inequality cannot be removed without unduly reducing the rates charged to the applicant." Anything which would tend to make the corporation work the navigation at a loss would be very much to be deprecated, and if we were to reduce the applicants' rates, or to suggest a reduction of the applicants' rates to 1½*d.*, we are not at all certain that we should not be putting such a burden on the corporation as might make it impossible for them to work the navigation. On the whole, we are inclined to suggest that temporarily and experimentally the parties ought to be satisfied if the applicants and those who are similarly circumstanced had the charge made against them reduced to 8*d.* on corn.

It must be distinctly understood that should circumstances alter in any way it will be open to these applicants or to any other traders to make a fresh application to have their rates

further reduced, or whatever application the circumstances of the case may require.

[Solicitors for the applicants : *Pritchard and Sons*, agents for *Hearfield and Lambert*, Hull.

Solicitors for the respondents : *Sharpe, Parker & Co.*, agents for *W. H. Andrew*, York.]

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CORPORATION
OF YORK.
Wright, J.

TIMM AND SON

v.

NORTH-EASTERN RAILWAY COMPANY, LANCASHIRE AND
YORKSHIRE RAILWAY COMPANY, AND OTHERS ⁽¹⁾.

Undue Preference—Benefit of Geographical Position—Group Rates—Cartage—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27.

January 21,
1901.

Upon a complaint by corn millers at Goole that the railway companies did not, in respect of flour traffic in four-ton lots consigned by the applicants from Goole, give the applicants the benefit of the geographical position of Goole as compared with the port of Hull, with regard to various inland towns, there being a saving of about one-fifth of the total distance to them from Hull in respect of Goole, whereas the rates charged were the same,

Held, that the railway company had failed to prove that if the same mileage rate per ton were applied to Goole as was applied to Hull any injustice would follow, or that the maintenance of the existing Goole rate were necessary to the maintenance of the Hull traffic; and, therefore, that the railway companies had given an undue preference to the traders in flour at Hull over the applicants by charging rates of the same amount as the rates at which they carried similar traffic from Goole for the applicants.

Where no reason is shown to the contrary the Court will act on the principle that similar charges should be made for similar services.

Upon a further complaint by the applicants that the railway companies collected in Hull, free of charge, flour when consigned by their railways, or allowed rebates off the rates charged for conveyance when the cartage was performed by the consignors, but refused to collect the traffic of the applicants at Goole free of charge, or to allow the applicants when they did the collection a rebate as allowed to their competitors at Hull,

Held, that such distinctions, as regards collection or charges for the same between Hull and Goole were an undue prejudice and disadvantage to the applicants at Goole as compared with their competitors in trade at Hull.

THIS was an application under section 2 of the Railway and Canal Traffic Act, 1854, and section 27 of the Railway and Canal Traffic Act, 1888.

The applicants were corn millers at Goole, who were in competition with the millers at Hull, each of them sending flour to a number of places within a radius of about 150 miles from Hull.

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

To these places the railway companies were charging the same rates from Goole as from Hull, although the distance from Goole was generally shorter by some 25 miles.

The railway companies contended that as many of these places were at the same or a less distance from Grimsby as from Hull (Grimsby being served by a competing line), the rates from Hull, Grimsby, and Goole were necessarily equal to maintain the competition. The railway companies rendered the service of collection for flour at Hull without additional charge; this they contended was an old practice rendered necessary by the competition of the lighters and carriers by water. The applicants considered this practice as unduly preferring their competitors at Hull; and the applicants alleged that they were already handicapped by having to pay lighterage charges on grain coming up the river from Hull amounting to 1s. 9d. per ton.

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YORKSHIRE
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AND OTHERS.

Balfour Browne, Q.C. (Whitehead with him), for the applicants.

Competition will not justify every inequality of rate: *North Lonsdale Iron and Steel Company v. Furness Railway Company* ⁽¹⁾; *Carrickfergus Harbour Commissioners v. Belfast and Northern Counties Railway Company* ⁽²⁾. There is no genuine competition here at all; Goole is already handicapped by 2s. 1d. for lighterage, and Ouse dues. Almost all the imported wheat comes to Hull. It is an advantage to the public to get grain from the three ports on fair terms. The rates are kept up by combination, since they are higher to competitive than to non-competitive places. A rate to Goole on the Hull scale would still leave Hull all her trade, as would also the raising of the Hull rates by the Goole lighterage charge (1s. 9d.).

Cripps, Q.C., C. A. Russell, Q.C. (Ernest Moon with them) for the North-Eastern railway company.

The two cases referred to turned on section 29 of the Railway and Canal Traffic Act, 1888; this case turns on section 27. The Commissioners must consider, first, whether the equality of

⁽¹⁾ *Ante*, Vol. VII. 146.

⁽²⁾ *Ante*, Vol. X. 74.

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rate has any geographical consideration to the advantage of the public in bringing in competing traders ; and, secondly, the effect of competition on the carriers themselves : *Pickering, Phipps v. North-Western Railway Company* ⁽¹⁾.

WRIGHT, J. : In this case the mileage distances from Goole to the points of delivery mentioned in the application, taken in the aggregate, are related to the distances to Hull from the same places in the proportion of about 80 to 100 ; in other words, the distance over which the applicants have their flour carried to the market towns where they supply, it is about four-fifths of the distance from Hull to the same places. It is immaterial for our judgment to fix the exact figure, but I give that by way of illustration. For the carriage over the shorter distances the rate is the same as the rate charged by the railway company for the carriage over the longer distances, and, of course, *primâ facie* that is enough to justify the application. The answer of the railway companies is that the rate from Hull is fixed at a lower scale proportionately to distance than the rate from Goole, because of the competition to which the traffic from Hull is subjected, and which makes it, according to the view of the railway companies, impracticable for the railway companies to charge the rates which they otherwise would charge from Hull ; but I am not at all satisfied that that is a comparison which is relevant to the question before us. It has not been suggested by the railway company that the rates from Hull are too low or otherwise unremunerative, and in point of fact it seems that the rates from Hull, even as kept down by this competition, compare somewhat closely with the rates to the non-competitive stations on the railway company's lines. And in view of those facts I cannot think myself that any case has been made out to show that the rate per ton per mile on this class of traffic from Hull to the stations mentioned is unremunerative, or in any respect too low. If that is a reasonable rate, why should not the applicants trading at Goole have the benefit of a similar mileage rate ? The situation of Goole already subjects them to very great disadvantages, disadvantages which any order we may make

⁽¹⁾ *Ante*, Vol. VIII. 108.

with regard to the inequality of rate may be unable to overcome. We have nothing to do strictly with that. But what is decisive to my mind on this part of the application is, that there has been no attempt whatever on the part of the railway company to show that if the same mileage rate per ton on the same kind of traffic were applied in the case of Goole that is applied in the case of Hull, any injustice or any improper consequence would have followed to the railway company; no evidence that the maintenance of the existing Goole rates is necessary for the maintenance of the Hull traffic, or that a reduction of the Goole rates would involve any interference with the Hull rates or with any public interest, or that the lower rate per mile from Hull is justified by the longer distances, and *prima facie* it seems to me that the Acts of Parliament intend that if there is no reason shown to the contrary we should treat cases of this kind on the principle that similar charges ought to be made for similar services. I do not say a word as to whether the railway company might or might not have made out a case for an unequal rate of charge. Very probably they are right in not entering into a question of general policy in a matter of this kind. I do not say that on another application they might not be able to give perfectly good reasons why the principle I have adverted to should not be applied, only I do not think they have done so in this case. Of the other part of the case I do not feel any doubt, and the inequality as regards cartage has not in reality been defended at all. The only justification for it as put forward, is that the rebate in Hull has been in operation for a very long time, and nobody knows how it has come about. On that part of the case there must be an order also inevitably in favour of the applicants, but, of course, we leave it to the railway company to remedy the inequality in any way they like. They may either put it on at Hull or take it off at Goole. In that respect we will not say anything to prejudice their discretion.

[Solicitors for the applicant: *Neish, Howell and Macfarlane.*

Solicitors for the North-Eastern railway company: *A. Kaye Butterworth.*]

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 Wright, J.

INVERNESS CHAMBER OF COMMERCE

v.

HIGHLAND RAILWAY COMPANY ⁽¹⁾.

Undue Preference—Traders' Tickets—Issue of at Rates varying according to amount of Traffic—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), ss. 7, 27 and 55.

June 4,
1901.

A railway company issued season tickets to traders who sent or received traffic yielding annually 250*l.* or over at a cheaper rate than to ordinary passengers, the cost of such traders' season tickets being about one-third of the cost of an ordinary season ticket. To traders whose traffic yielded over 1,000*l.* the railway company gave a still greater reduction on the season ticket rate.

Upon a complaint that the railway company were unduly preferring traders who sent or received large quantities of traffic to those sending or receiving small amounts of traffic,

Held, that it was entirely a matter of fact whether the preference given was undue, and that where such a preference was given to all persons alike upon purely business considerations, there was a strong presumption that the preference was not undue; and that, on the facts proved, no undue preference existed.

THIS was an application under section 2 of the Railway and Canal Traffic Act, 1854.

The applicants, the Inverness Chamber of Commerce, had obtained a certificate from the Board of Trade under section 7 of the Railway and Canal Traffic Act, 1888, that they were a proper body to make a complaint to the Commissioners without proof that they were aggrieved by the matter complained of.

They complained of the system in vogue on the Highland railway by which traders who sent or received traffic amounting to the sum of 250*l.* or over per annum were granted season tickets at about one-third of the ordinary rate, while a trader who sent 1,000*l.* worth of traffic per annum obtained a still further reduction.

⁽¹⁾ Before Lord STORMONTH DARLING, and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Parliament House, Edinburgh.

The rates for a season ticket for a distance of 25 miles and a period of twelve months vary as follows :—

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Ordinary Passenger and Trader whose traffic yields less than 250 <i>l.</i>				Trader whose traffic yields more than 250 <i>l.</i> , and less than 1,000 <i>l.</i>				Trader whose traffic yields over 1,000 <i>l.</i>			
	£	s.	d.		£	s.	d.		£	s.	d.
1st Class ...	24	7	6		8	15	0		6	18	0
3rd Class ...	15	15	0		5	10	0		4	3	0

The railway company admitted the system, but denied that it constituted an undue preference, since the same advantage was offered *bonâ fide* to all persons alike on the same terms. The railway company further stated, "that all the railway companies in the United Kingdom have for many years been in the practice of issuing periodical tickets to traders contributing certain minimum sums to the revenue of the railway companies at lower rates than are charged to ordinary season ticket-holders, and that the practice has been highly beneficial in the promotion of commerce. The tickets are issued chiefly to wholesale traders and commercial travellers who are engaged in soliciting orders and in distributing commodities along the lines of railway, and it is reasonable and of great public convenience that they should be induced to travel as much as possible. This is especially the case in a sparsely populated district such as is served by the Highland railway, where there are few towns and the distances between the towns and villages are comparatively long. The amount of travelling required to be done in order to secure orders is very great, and unless low rates are continued to be charged for traders' tickets, the scanty commerce which now exists in the district of the Highland railway, and which requires every possible encouragement, will be materially reduced to the detriment of the public. Traders' tickets have been and continue to be granted by the railway company at the request of the trading community, and in their interest. They have the effect of promoting traffic upon the railway, but at the same time the railway company suffer loss of passenger revenue by issuing them at lower rates than the ordinary season tickets, and consequently, as matter of revenue it is not of serious

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moment to the railway company that they should be continued, although it is of serious moment to the traders."

Guthrie, K.C., and Hunter appeared for the applicants.

Macphail appeared for the railway company.

LORD STORMONTH DARLING: This application brings under our notice the practice followed by the Highland railway company of offering traders' tickets at varying rates. Those rates vary according to the amount of traffic which is sent or received in the course of the year by the persons who apply for these tickets. If the amount of traffic is sent or received does not yield as much as 250*l.* per annum to the coffers of the company, then no trader's ticket can be issued at all. If 250*l.* is yielded then the ticket is issued, but at a somewhat dearer rate than those issued if the traffic exceeds the 1,000*l.* limit. In so far as the company distinguish between 250*l.* and 1,000*l.* worth of traffic, it would appear from the evidence that their practice is exceptional, or at all events is only shared by, I think, one other company; but in so far as they refuse to issue traders' tickets at all below a certain limit, it appears that they were acting in accordance with the practice of all railway companies in the kingdom. / The applicants admit that the Highland railway company are not bound by statute to issue traders' tickets at all, but they say that if they do issue such tickets they ought to make no difference among traders, but ought to issue the tickets to all of them without regard to the volume of traffic which they send or receive. It seems to me that there being to some extent a preference of one trader over another, the whole question comes to be whether that preference is undue, and that is a question purely of fact. There is, in my opinion, a strong presumption that when a preference of that kind is offered and given to all and sundry upon purely business considerations, without any element of caprice or arbitrary choice about it, the preference is not undue. It stands precisely on the same footing as the undoubted preference which is given to the holder of a season ticket or a week-end ticket, or any other ticket issued on more favourable terms than those offered to the

ordinary passenger who takes his ticket at the daily rate. The ground for this preference obviously is that the company find it to their interest to encourage travelling, and are willing to carry the passenger for a rate which would not be remunerative if it were a single journey, in the expectation that he is going to make a number of journeys. Similarly here the company looked for those favoured persons contributing such an amount of goods traffic to their revenue as would make it worth their while to carry them as passengers at rates which would not be remunerative if they contributed less. That is a purely business consideration, of which the company is, in the first instance, the best judge; and although I am far from saying that a case might not arise where it would be competent for, and might be the duty of this Commission to examine and adjudicate upon the amount of difference so meted out to different persons or different classes, still, I am equally clearly of opinion that here no such case has been made. Both on the admission in the pleadings and on such proof as has been led, it appears to me that the preferences here given are not undue, and therefore that the application must fail.

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 Lord
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 Darling.

SIR FREDERICK PEEL: I take the same view as the learned Judge.

LORD COBHAM: I concur.

[Solicitors for the applicants: *Kinmont and Maxwell*.

Solicitors for the railway company: *Stewart, Rule and Burns*, Inverness.]

CHARINGTON, SELLS, DALE & Co.

v.

MIDLAND RAILWAY COMPANY (1).

Undue Preference—Coal Traffic—Rebate under Special Agreement—Damages recoverable for Six Years only—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), ss. 13, 27.

August 1, 2, 7,
1901.

A railway company had, since the year 1889, under an agreement, allowed a rebate of from one to one and a quarter per cent. upon the total annual carriage accounts paid by Messrs. Rickett, Smith in respect of the carriage of coal from collieries situated on the railway company's system of railways to all stations or places in the United Kingdom, other than stations on the Great Eastern railway outside London.

The applicants, who were competitors in trade with Messrs. Rickett, Smith, complained that the railway company had not allowed such rebate in respect of similar traffic carried by the railway company for the applicants and delivered in like manner. The applicants first became aware of the existence of the rebate in October, 1900.

Held, that the terms and conditions contained in the agreement with Messrs. Rickett, Smith did not afford a justification for the railway company making a difference between Messrs. Rickett, Smith and the applicants as regards any rebate on their annual carriage accounts of more than a quarter per cent. in favour of Messrs. Rickett, Smith.

The Court, therefore, allowed to the applicants on their annual accounts with the railway company for the carriage of coal from collieries on the railway company's system of railways for six years before the termination of the agreement damages equal to the allowance per cent. made by the railway company during that period to Messrs. Rickett, Smith on their annual carriage account with the railway company for carriage of similar traffic, less one quarter per cent., such damage to be in respect of the applicants' coal traffic to places (stations on the Great Eastern railway company outside London excepted) to which comparable and competitive coal contributing to their carriage account with the railway company had also been sent in substantial quantities within twelve months by Messrs. Rickett, Smith.

Held, further, that the words " Rebates are allowed to coal merchants off their coal traffic accounts in certain cases and upon certain conditions, where the annual tonnage carried exceeds 25,000 tons. Particulars of the conditions qualifying merchants to this allowance may be obtained on application to the

(1) Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM sitting at the Royal Courts of Justice, London.

general manager," inserted in the rate-books were not sufficient to disclose the existence of the rebate in accordance with the 14th section of the Regulation of Railways Act, 1873.

THIS was an application under section 2 of the Railway and Canal Traffic Act, 1854.

The applicants were London coal merchants, for whom the Midland railway company had for thirty years carried large quantities of coal, and they complained that from the year 1889 the Midland railway company had made to a firm of coal merchants, Messrs. Rickett, Smith & Co., of King's Cross, a rebate in respect of all coal carried for such merchants by the Midland railway company or their agents, to all stations or places in the United Kingdom other than stations on the Great Eastern railway company outside London, while not allowing it to the applicants in respect of similar traffic carried by the Midland railway company for them, and delivered in like manner. The rebate was at the rate of 1 per cent. upon the total amount of the carriage accounts in respect of the coal traffic until the year 1892, in which year it was increased to $1\frac{1}{2}$ per cent.

The applicants stated that the existence of this rebate had been so far as possible kept secret, no notice of it having been published either in the rate-books or lists supplied from time to time by the Midland railway company to their customers; and that they first became aware of its existence in the month of October, 1900. The applicants alleged that this was an undue preference in favour of Messrs. Rickett, Smith & Co., and asked for 5,250*l.* damages.

The railway company admitted the existence of the agreement dated the 31st January, 1889, but stated that it had ceased to be in operation on February 7th, 1901, and had not since been renewed. They stated that they would always have been willing to enter into a similar agreement with the applicants or any other trader who was in a position to put traffic upon their line to the same extent and under the same conditions as provided for under the agreement, and they denied that the discount allowed to Messrs. Rickett, Smith & Co. had been improperly kept secret. And further, that during the period the discount complained of was made, the applicants had never carried on a

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trade large enough to enable them to fulfil the term of the agreement, upon which alone the discount was allowed. The railway company submitted that under the conditions provided for by the said agreement, the discount allowed to Rickett, Smith & Co. did not constitute an undue preference; and as regards so much of the claim for damages as arose more than six years before the date of the application, the railway company relied on the Statute of Limitations.

The agreement in question was as follows:—

“An agreement made the 31st day of January, 1889, between the Midland railway company (hereinafter called ‘the company’) by John Noble, their general manager, of the one part, and Rickett, Smith & Co., of King’s Cross, London, and elsewhere, coal merchants (hereinafter called ‘the merchants’), of the other part. Whereas the merchants carry on business as coal factors and coal merchants at various depôts in London and at various towns and places in the south of England and elsewhere, and a large proportion of the coal sold by the merchants has been conveyed by the company from collieries at or in connection with their system either to its destination or to the junction with the railway of some other company at through rates which are charged by and payable to the company, and whereas the course of business has been for the merchants to pay the carriage upon all coal sold by them whenever practicable, and they have paid such carriage direct to the company, who have accounted to the other companies respectively for their respective proportions, and whereas the payment of carriage by the merchants as aforesaid instead of by the respective consignees of the coal has been of advantage to the company, and in consideration thereof and of the merchants having directed a large share of the traffic under their control over the Midland railway in preference to other railway routes, the company have made to the merchants a rebate or allowance upon the amount payable by them for carriage as aforesaid, and whereas it is expedient that the terms and conditions upon which such rebate or allowance is made should be clearly stated, now it is hereby agreed by and between the parties hereto as follows:

1. The merchants will during the continuance of this

agreement endeavour as they have hitherto done to favour the company's route for traffic when that route is equally convenient with that of any other company.

2. The merchants will, whenever it is conveniently practicable so to do, pay to the company the carriage upon all coal sold by them at places upon or beyond the company's railway.

3. The merchants will pay to the company their accounts for carriage at the times when such accounts shall be payable according to the company's regulations from time to time in force, punctuality of payment being a material condition of this agreement.

4. The company will allow to the merchants a rebate or allowance at the rate of 1 per cent. upon the total amount of their carriage accounts provided that the total amount of such carriage accounts shall not be less than 140,000*l.* in any one year.

5. Such rebate or allowance shall be paid annually in the month of February upon the carriage accounts for the preceding year.

6. This agreement shall continue in force for a term of five years, and shall thereafter be determinable by either party at any time on giving three months' previous notice to the other party, provided that if a competent court shall decide that this agreement constitutes an undue preference towards any other trader or class of traders either party shall have the right to determine it forthwith, and this agreement shall not prevent the trader from claiming equally favourable terms and conditions to those afforded by the company at any time to any other merchants carrying on a similar business. As witness the hands of the said parties,

(Signed) JOHN NOBLE.

(Signed) RICKETT, SMITH & Co."

The following notice had been inserted in the rate-books :—
 "Rebates are allowed to coal merchants off their coal traffic accounts in certain cases and upon certain conditions, where the annual tonnage carriage exceeds 25,000 tons. Particulars of the conditions qualifying merchants to this allowance may be obtained on application to the general manager."

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Balfour Browne, K.C., Pickford, K.C. (Roskill and C. W. Turner with them), for the applicants.

The preference being secret prevents other traders putting themselves in the position to offer similar advantages to the railway company. The applicants have paid their accounts in the same manner as the agreement requires. There is no decision which says that merely large quantities of traffic justify a lower rate, unless there is some commensurate saving to the railway company. As regards damages, the Statute of Limitations refers only to an "action," which this is not. The right to damages is conferred by section 12 of the Railway and Canal Traffic Act, 1888; and they arose in 1889. They cited *Daldy & Co. v. Midland Railway Company* (1).

C. A. Cripps, K.C., Asquith, K.C. (Ernest Moon with them), for the Midland railway company.

The agreement did not constitute a special rate which could be inserted in the rate-book; it merely arranged a discount on the amount. Lord Herschell, in *Pickering-Phipps v. London and North-Western Railway Company* (2), held that competition was an element to be considered. Here competition by sea was a material factor in originally making the agreement. At least half of Rickett, Smith's coal came to London and to places beyond which could obtain coal just as conveniently by sea from the northern ports. The applicants could not compete with sea-borne coal. The other two factors were the advantages gained to the railway company by the large amount of the traffic, and by the direct payment of carriage, relieving the railway accounts. The amount of the rebate could not be complained of. The preference was not undue.

Robson, K.C. (Edward Bray with him), was heard on behalf of Messrs. Rickett, Smith & Co.

WRIGHT, J.: There is one part of this case on which we do not take altogether the same view, and therefore it is necessary

(1) *Ante*, Vol. X. 303.

(2) *Ante*, Vol. VIII. 83.

for us to deliver separate judgments, though I do not think that there will be any great practical difficulty in the result. Therefore each judgment must be taken separately. Speaking for myself there are two reasons why some of the earlier cases on questions of this kind were involved in some uncertainty. One was inattention to the difference between the obligations of a railway company under the Railways Clauses Act in respect of traffic of different persons passing over the same piece of line, and their obligations under the Traffic Act of 1854. Even in the House of Lords in *Evershed's Case* ⁽¹⁾ the opinions of the Law Lords were certainly not expressed so as to call attention to that distinction, but that distinction was established in the House of Lords, in the *Denaby Main Case* ⁽²⁾, and has ever since been fully recognised. The other reason why some of the earlier cases are not always useful now is to be found in section 27 of the Traffic Act of 1888, which directs that, in deciding whether difference of treatment does or does not amount to an undue preference, the Commissioners may, so far as they think reasonable, in addition to other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and so forth.

Now, since the decision of the Court of Appeal in the *Pickering-Phipps Case* ⁽³⁾, it is clear that we may, and so far as is right ought to, take into consideration whatever is properly relevant to the question whether a preference is undue or unreasonable, in addition to the further tests supplied by the 27th section of the Act of 1888. Here the case turns mainly upon the following suggestions made on behalf of the respondent company. It is said that the allowance to Messrs. Rickett, Smith & Co. was given in good faith, and in the interests of the public as well as in the interests of the respondents, as a necessary inducement to Messrs. Rickett, Smith & Co. to take coal from the Midland coalfields and rail it to districts south

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⁽¹⁾ 3 App. Cas. 1029.

⁽²⁾ *Ante*, Vol. III. 426; 11 App. Cas. 97.

⁽³⁾ *Ante*, Vol. VIII. 88.

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of the Thames instead of bringing north country coal by sea. It is further said that there was a sufficient reason for confining this privilege to Messrs. Rickett, Smith & Co., namely, that they alone had a large enough business south of the Thames to enable them to compete by sea, because the large steamers in use required quick clearing, which they alone could effect, and it was said that the sea furnished an effective competitive route for coal from an alien district, and that the Midland company had a right to buy off that competition by a reasonable allowance to the only firm which was able to defeat that competition, and that it was a great advantage to the company to do that, and a great advantage to the public, in that another coalfield was brought into effective competition with the northern coalfields in the southern markets. I have no doubt that the justification for the allowance so put forward would be sufficient in law, if made out in fact, if the amount of the allowance is reasonable, and if it was open to other traders who are able to secure a similar advantage to the railway company to obtain similar terms for themselves. Mr. Beale, of the Midland railway company, told us that, according to his recollection of the transaction which resulted in the agreement under which the allowance was given to Messrs. Rickett, Smith & Co., the desire to obviate the seaborne competition of the north country coal to places south of the Thames was necessarily limited to Messrs. Rickett, Smith & Co., because at that date they stood alone in having a large enough trade to those places to make their competition formidable. Speaking for myself, I have come to the conclusion, although I accept absolutely Mr. Beale's recollection of what took place so many years ago, that the arrangement was not quite so closely adjusted to the facts of the case as he seemed to think. I doubt if it was an arrangement intended or adapted solely to carry out those objects, and I doubt whether the benefit given to Messrs. Rickett, Smith & Co. was one merely commensurate with or was, in fact, measured by that object. The agreement is in writing, and it contains recitals which state what the reasons for the allowance were. Those recitals do not mention that ground at all. When we come to the pleadings in this case the answer of the railway company does not raise that ground at all, or

allude to it in any way, and further the allowance itself is not limited to coal which would be subject to that seaborne competition, but is spread over the whole of the coal. I do not lay so much stress upon that last part, because Mr. Beale explained that, however much they might have had in mind the seaborne competition, it was thought convenient to spread the allowance over the whole of Messrs. Rickett, Smith & Co.'s traffic. Still that observation has to be made. Further, I must add this, that the object which the Midland railway company had in so far as they were thinking of the seaborne competition, seems to have been long since attained, and it is not at all proved to my mind that the Midland coal any longer requires, or has for years required, such protection as this agreement with Messrs. Rickett, Smith & Co. gave, nor, in fact, was the benefit of a similar allowance open to the other traders. It was so secret that even Mr. Shaw ⁽¹⁾ did not know of it, and denied its existence, and surely the traders had a right to expect that Mr. Shaw would know of anything which was to affect their interest, and which it was also important should be disclosed to them.

On these grounds I think that the reason put forward by the railway company as the general justification for the preferential allowance to Rickett, Smith & Co. is not made out. In any case it is obvious that the reason put forward would be no justification whatever for preferential allowance to Rickett, Smith & Co. as regards places not affected by the suggested competition. A coal merchant trading only to London and not south of London could clearly complain of the preferential treatment of Rickett, Smith & Co. as regards traffic to or short of London, and it cannot make any difference in that respect, that the merchant also trades to places where the competition exists.

So much for the principal matter in dispute; but, besides that, there is the question whether some portion of the allowance made to Rickett, Smith & Co. could not be justified on grounds of a different kind. It was said that the traffic of Messrs. Rickett, Smith & Co. was carried on in a way which effected, in favour of the railway company, savings in the matter of clerkage and canvassing, and advantages as regards

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ease of collection of sums of money due to the company, very much in consequence of the extended system of what was called factorage which Messrs. Rickett, Smith & Co. adopted more than their competitors in this business. I am not prepared to say (and I think all the members of the Court agree) that there might not be some substance in those contentions of the railway company. I think we are all agreed that a quarter per cent. in those respects would be enough to allow Messrs. Rickett, Smith & Co.

Then comes the subsidiary question whether there is anything that prevents the applicants from recovering for the past. I think it is clear that they did not discover this agreement with Messrs. Rickett, Smith & Co. until October in last year, and I think it is also clear that the railway company have no defence under the 13th section of the Act of 1888. I cannot think for a moment that the arrangement with Messrs. Rickett, Smith & Co. was disclosed in a manner sufficient to satisfy those provisions of the Act of 1888, or section 14 of the Act of 1873.

As regards the time for which the allowance should be carried back, I think it should be six years, and six years only. The words of the Statute of Limitations of James I., which are applicable, are the words "Action on the case." If this had been simply an action, I should have thought on the authority of *Bradlaugh v. Clarke* ⁽¹⁾, in the House of Lords, and other cases of that kind, that a proceeding in this Court by an ordinary person in pursuit of an ordinary legal remedy in an ordinary character, would be an action. Whether it is an action on the case we need not decide, but I think we ought to follow the analogy of the Statute of Limitations, and I certainly am not at all prepared to find that the concealment that existed in this case was in any sense at all fraudulent, or involved any kind of improper conduct on the part of the Midland railway company. If there was anything wrong it was a mistake or misunderstanding, and therefore I think there is no reason why the analogy of the Statute of Limitations should not apply.

The general question whether the mere comparative greatness

⁽¹⁾ 8 App. Cas. 354.

of the volume of traffic unattended by any consequent economy to the railway company, or other special advantage in working it, would be enough to justify a rebate or allowance has not been argued in this case, and I do not wish to say anything more about it than this, that if an allowance or rebate were justified simply on the ground of quantity of traffic, if such a principle were admitted (unless, perhaps, where the disparity was so great that on one side there was a large volume and on the other side some insignificant trifle of traffic) it would justify a differentiation of charges in so many cases that the rule itself against preference would be in danger of disappearing, and the small trader would be in a more hopeless position than the position in which he now is. That point we do not attempt to decide because it was not argued.

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SIR FREDERICK PERL: The applicants in this case are coal merchants, and complain of the Midland company having given an undue preference to Rickett, Smith & Co., also coal merchants, by entering in January, 1889, into an agreement with them by which they were to receive a rebate of 1 per cent., afterwards increased to $1\frac{1}{2}$ per cent., on the total amount of their carriage account. The agreement was to continue in force for five years, and to be thereafter terminable by either side giving to the other three months' notice. It seems to have been kept very private, and was not known to any of the railway companies competing with the Midland. But it was made public in October, 1900, consequent upon some enquiries about rebates to which the case of *Dalby v. Midland Railway Company* ⁽¹⁾ gave rise, and in November, 1900, the railway company informed Rickett, Smith & Co. that the publication of the agreement had led to so many complaints both by coal traders and other companies that it was necessary for them to use their power to put an end to it by notice, and it expired accordingly in February last. The advantage which the Midland railway company hoped to secure by the agreement was, a coal traffic over their line large enough to yield annually a sum from rates of not less than 140,000*l.*, the rebate not being payable unless the quantity

(1) *Ante*, Vol. X. 508.

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carried for Rickett, Smith & Co. was sufficient for that purpose, and, as part of that traffic through the indirect operation of the agreement, a considerable proportion of the coal sold by Rickett, Smith & Co., in the districts south of London served by the Brighton and other southern lines. Rickett, Smith & Co. had established a large business in the sale of coal south of London, getting the coal partly by land and partly by sea, and it was greatly to the interest of the Midland railway company that the coal that was railway borne should be supplied from the Midland Counties coalfields, and should be brought to London by means of their railway, not only because of the profit to be derived from conveyance, but also because Rickett, Smith & Co. defrayed all expenses in canvassing for orders and collecting charges. But of the two modes of conveyance that by sea is the cheaper, and one object of giving Rickett, Smith & Co. the allowance off their total amount was to lessen the advantage in that respect which coal seaborne to London or other ports had over coal carried by the Midland railway, and it seemed to the Midland railway company that there was no undue preference in giving it to Rickett, Smith & Co., because their position in the market south of London was such that no other merchant consigning by the Midland line could compete with them, taking into consideration that nothing in the agreement restricted them from obtaining supplies of coal by sea to any extent they pleased, and that from the largeness of their consignments they could have recourse, to meet opposition, to this cheaper route, where dealers in smaller quantities would practically be excluded from it. I think this contention of theirs is borne out by the evidence, and that so far as Rickett, Smith & Co. have had a rebate on traffic conveyed *via* the Midland railway to places beyond it or upon the southern railways to which there was an effective competitive route by sea no case of undue preference has been made out.

The agreement, however, goes further than this. It gives a rebate on the total amount of Rickett, Smith & Co.'s carriage account, and coal destined for any part of London or for any place on the Midland system would all contribute to this

account. On such coal, however, no distinction of charge between Rickett, Smith & Co., and the applicants can or has been attempted to be justified, except so far as special circumstances or difference in quantity may have enabled the railway company to conduct Rickett, Smith & Co.'s traffic at a less cost than that of the applicants', and I think the applicants should have the benefit, as regards charges for coal carried for them to places at which they have dealt, of any allowance which has been made to Rickett, Smith & Co. off their charges to the same places, and which has not been due to the circumstances above referred to. As to those circumstances there is a provision in the agreement that Rickett, Smith & Co. shall pay to the Midland railway company the carriage upon all coal sold by them at places upon or beyond the company's railway, and the payment by the trader instead of by the respective consignees of the coal, with its bearing upon account-keeping and clerkage, and the risk of bad debts, is an advantage to the railway company. As, however, the agreement was not made public, and the applicants could not know that this was an economy for which the railway company would make an allowance off their charges, any difference in the practice of the applicants in paying carriage for their consignees or for use of lines beyond the Midland, ought not to count against them. But the principal difference of circumstance is the greater quantity of Rickett, Smith & Co.'s traffic. Their daily wagon consignment is put at 270, as against 73 that are sent by the applicants. Nothing is claimed for difference of cost in conveying the trucks from the collieries to London, for they come mixed together, but on arrival there, they have to be separated for distribution, and the cost at which this is done depends upon the number that can be shunted and marshalled at a time. The larger the dealer the more likely is it that his trucks can be shunted at a saving of time and expense, truck for truck, and in return for this gain the railway company may not unreasonably make to Rickett, Smith & Co. some allowance proportionate to their larger traffic. What exactly the proper allowance would be it is not easy to say, but I adopt the learned judge's figures of $\frac{1}{4}$ per cent. I consider the applicants have made out a case for damages under

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sections 12 and 13 of the Traffic Act of 1888, but that the period over which they should extend should not go more than six years back.

LORD COBHAM: The defence of the railway company to the charge that their allowance of a rebate or discount to Messrs. Rickett, Smith & Co. under the agreement of 1889 constituted an undue preference rests on two main grounds. They contend, firstly, that owing to the circumstances and magnitude of Messrs. Rickett, Smith & Co.'s traffic, the saving in the cost of dealing with it, as compared with that of the applicants, was at least commensurate with the amount of the rebate, and that therefore there was no preference for them to justify. I must admit that I entertain some doubts whether a quarter of the amount of the rebate which is proposed, that is about 16 of 1d. on a 4s. 6d. rate, fully represents the amount of the saving; but the railway company upon whom the onus lies have not been able to give any figures or estimate on this point, and where so much is left to conjecture I should not be inclined to differ from the majority of the Court.

The second defence set up by the company is based on competitive grounds. They say that Messrs. Rickett, Smith & Co. have established a new market for coal in the south of England practically amounting to a monopoly, and that by means of the 1889 agreement the railway company secured for themselves the carriage of a large share of this traffic, one half of which might otherwise have been diverted to the sea route. I am of opinion that this defence has not been adequately established. The agreement says nothing about sea competition, and I am not satisfied that it is in fact due to the rebate of between 1d. and 2d. a ton, set against a saving of 9d. by sea carriage, that so large a traffic has been sent by rail. Messrs. Rickett, Smith & Co. sent coal by rail much in excess of the amount upon which the minimum of 140,000l. is paid, and this points to the conclusion that owing to local or other circumstances Messrs. Rickett, Smith & Co. to a large extent find the land route the more convenient of the two. So

far as that is so the justification of the railway company on competitive grounds would fail. But whether the rebate has been effective or not from the Midland railway company's point of view, it may have been of material assistance to Messrs. Rickett, Smith & Co. in establishing and maintaining their predominant position in the south of England which we are now asked to regard as a main justification of that rebate. A very small percentage in the coal trade makes the difference between profit and loss, and it may very well have been as stated by some witnesses that the advantage given to Messrs. Rickett, Smith & Co., so far as regards the south of England, turned the scale in their favour and against their competitors. It is impossible to disprove this assertion owing to the non-publication of the rebate by the railway company, which prevented Messrs. Charrington, Sells & Co., and other large firms either from calling it in question or from claiming to share in its advantages. Thus there was no open competition on equal terms. It is true that the non-publication of a preferential rate is not necessarily a proof of undue preference, but if I rightly understand the ruling in the *Daddy Case* (¹), a non-publication which denies to some traders the opportunity of sharing in preferential terms accorded to others, goes far to render a preference undue, which might otherwise be defensible.

The agreement on the face of it seems to be merely an undertaking by the railway company to give a percentage discount in consideration of a certain large amount of traffic being secured to them. This, no doubt, was a pure business transaction based upon competitive considerations, and so far as it promoted lower rates and efficacy of service, it was in the interests of the public. But such arrangements must inevitably tend towards the monopoly of trade by the more powerful firms, and this in my view would be contrary to a main intention of Parliament in legislating against undue preference. But I need not labour that point as I do not understand that a contrary view is put forward by the defendants, and I concur in the conclusion that the railway

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(¹) *Ante*, Vol. X. 303.

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company have failed to establish their defence except to the extent of a quarter of the rebate.

[Solicitors for the applicants: *Turner, Son and Foley*.

Solicitors for the Midland railway company: *Beale & Co*.

Solicitors for Messrs. Rickett, Smith & Co.: *Deacon & Co.*]

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v.

THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY ⁽¹⁾.

Rebate on Siding Rates—Siding “not Belonging to the Company”—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 4.

Section 4 of the Railway and Canal Traffic Act, 1894, enacts that:—“Whenever merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate.”

A siding was constructed by a railway company upon a plot of land adjacent to their railway, leased to them by a trader for a term of 996 years at the yearly rent of 1*d.* The trader himself was a lessee of the plot of land at a yearly rental of 7*l.* odd. The sub-lease contained covenants that the railway company would erect a warehouse and construct a siding upon the plot demised, with proper connections connecting their main line with the warehouse; keep the siding and warehouse in repair; haul from the neighbouring station (a distance of three-quarters of a mile) into the siding, free of charge, wagons consigned to the owners or occupiers of the said trader's mills; take away at their own expense all covering used for such traffic and check the goods; and afford to the owners or occupiers of the mills free use and enjoyment of the warehouse; provided that, if they (the owners or occupiers) did not require the use of the whole warehouse, the railway company were to be entitled to use such parts as might not be from time to time required. The owners or occupiers of the mills were to move the wagons from the point on the siding where left by the railway company to the warehouse, and also to load and unload, and perform all necessary labour, at their own cost and risk.

Held, by the Court of Appeal (affirming the judgment of the Railway Commissioners), that the siding was a siding “belonging to the railway company,” not only in the sense that they were lessees entitled to the possession of it, but also in the sense that they were entitled to the user of it, subject to the easement granted to the trader.

Held, that the words “belonging to the company” in section 4 of the Railway and Canal Traffic Act, 1894, do not mean belonging, in a legal sense,

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

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as being owners of real property; and that it would be possible for a siding to be on the freehold of a railway company, and yet not to belong to the company within the meaning of the section.

THIS was an application under section 4 of the Railway and Canal Traffic Act, 1894. The applicants were paper makers at Hollin's Mills, Darwen, in Lancashire, and they applied for siding rebates from the Lancashire and Yorkshire railway company. The siding in question was constructed in pursuance of a lease dated November 22nd, 1866, whereby the lessors (who were predecessors in title of the applicants) demised to the respondents a plot of land adjacent to the railway of the respondents for a term of 996 years at the yearly rent of 1*d.* One of the recitals of this lease was as follows:—"And whereas (the lessors) lately applied to and requested the said Lancashire and Yorkshire railway company to construct a siding, shed and other works on the said plot of land for the use of the said company and the owners or occupiers of the mills, which the said company have agreed to do on the said (lessors) making the demise and entering into the covenants on their part hereinafter respectively contained." The respondents then covenanted with the lessors, their executors, administrators and assigns, to erect upon the plot demised a warehouse, and construct (also upon the plot) a siding connecting their main line with the warehouse. The railway company also covenanted to keep the siding and warehouse in repair, to haul any wagons consigned to the owners or occupiers of the applicants' mills from Darwen station into the siding free of charge (the consignees to move the wagons from the siding into the warehouse, and to load and unload at their own risk and cost); to take away all coverings used and to check the goods at their own expense; and also to afford the owners or occupiers of the applicants' mill free use and enjoyment of the warehouse, provided that if the use of the whole warehouse was not required, the railway company were to be entitled to use the portions not from time to time required.

The applicants, in claiming that this siding was a "siding not belonging to the railway company" within the meaning of section 4 of the Railway and Canal Traffic Act, 1894, also relied on the proviso to section 5 of the Lancashire and Yorkshire

Railway Act, 1891, which, after authorising a widening of the railway, enacted as follows :—" Provided always that nothing in this Act contained shall authorise the company to enter upon, take, use or interfere with the siding, warehouse, and works or the approach thereto, as the same are now used and enjoyed by Messrs. Potter & Co., of the Hollin's paper mill, Darwen, and which are referred to and are the subject of a certain indenture of lease dated the 22nd day of November, 1866, and made between J. G. Potter (and others) of the one part and the company of the other part, without the consent in writing of the said parties of the first or one part, their heirs, executors or assigns owners or occupiers of the said Hollin's paper mill, nor shall anything in this proviso contained affect, lessen or prejudice the powers, privileges and rights of either of the said parties to the said indenture of lease."

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Balfour Browne, Q.C., Danckwerts, Q.C. (Whitehead with them), for the applicants.

It is only necessary to prove that the siding does not belong to the railway company; it is not necessary to show to whom it does belong. If it were constructed for the use of the trader and the railway company, that is sufficient. The applicants have the permanent use of the warehouse; if there is no room the railway company cannot use it at all, and the siding is then useless to the railway company.

Cripps, Q.C., C. A. Russell, Q.C. (Ernest Moon with them), for the respondents.

The covenant obliging the traders to move the wagons from the point on the siding where they have been deposited by the railway company would be unnecessary if it were a traders' siding. Also, if the warehouse belonged to the traders, there was no necessity to have a covenant giving them the preferential right of user. The case of *Pidcock & Co. v. Manchester, Sheffield and Lincolnshire Railway Company*⁽¹⁾ is in the present respondents' favour.

(¹) *Ante*, Vol. IX. 45.

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WRIGHT, J. : This question arises under the 4th section of the Traffic Act of 1894, which says that : "Whenever merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway company does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute and to determine what, if any, is a reasonable and just allowance or rebate." The first question here is whether this siding is one which is within those words "not belonging to the railway company." "Belonging" there, of course, does not mean freehold or anything of that kind. It is perfectly possible for a siding to be on the freehold of the company and yet not to belong to the company within the meaning of that section. Still, that is an element to be considered ; and here the siding either is on freehold of the company or it is on land in which they have a term of 996 years from the date of their lease. The company made the siding, they maintain the siding, and they have free and absolute right to use the siding themselves for their own traffic, or to allow other persons to use it, subject only to a very strong and substantial kind of easement which the applicants have in it, the right in the applicants to have their traffic, that is, traffic apparently consigned to Darwen station, brought there by the railway company free of running cost, and free of the cost of removing sheets, and free of the cost of shunting. Subject to those rights which do not appear to be enlarged by the saving clause in the later Act of 1891, although they are recognised by that Act, subject to those rights it appears to me that the siding belongs to the railway company. It clearly does not belong to the applicants in as high a degree as the degree in which it belongs to the company.

SIR FREDERICK PEEL and LORD COBHAM concurred.

The applicants appealed against this decision.

Balfour Browne, K.C., Danckwerts, K.C. (Whitehead with them), for the appellants.

By the covenants in the lease, the railway company cease to have any control over the traffic, directly the truck is on the siding line. No right of overflow user is reserved to the railway company, as regards the siding, but only in the case of the warehouse. If the right to use a siding free of charge has been bought by payment down, it "belongs" to the purchaser for the carriage of all goods of his which are conveyed to that siding—a *fortiori* when (as is the fact in this case) the purchaser has the whole use of the siding. The question of "belonging" must be tested with reference to the contract of carriage for which the rate is charged, and about which the dispute arises. The word "belonging" does not mean "property." If the lease is construed in its strict legal sense, the land and the siding "belong" to the freeholder; but the railway company's rights in the siding being entirely subservient to the rights of the appellants, it is a siding not belonging to the railway company within the meaning of the section, and within the decision of *Pidcock's Case* ⁽¹⁾.

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Cripps, K.C., C. A. Russell, K.C., and Ernest Moon, for the respondents, were not called on.

A. L. SMITH, M.R.: The point in this case is as to what is the meaning of three or four words in the Railway and Canal Traffic Act of 1894. The words being: "A branch railway not belonging to the company." I will read the first three lines of that section: "Whenever merchandise is received or delivered to a railway company at any siding or branch railway not belonging to the company." Then—"In the case of dispute in regard to the allowance on terminals" and so on, they are to go before the Commissioners. Now it is said the question does not come within the purview of that section, because it is not a siding or branch railway not belonging to the company; or, in other words, it does belong and is a siding or branch railway belonging within the meaning of that section in the Railway and Canal Traffic Act. The trader asserts on the other side that is not so.

⁽¹⁾ *Ante*, Vol. IX. 45.

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A. L. Smith,
M.B.

Now what do we start with? I agree with what has been said by the learned counsel at the bar, and I agree also with what is said by Mr. Justice Wright in the Court below, that the words "belonging to the company" do not mean belonging in a legal sense as being owners of real property. I agree, too, that the fact with regard to this lease of 1866 is a matter which, as I said before, must not be lost sight of, because it is the foundation of the whole question we have had to decide—the foundation, but not the whole of it. What happened? What did this trader who is now applying to Mr. Justice Wright, saying that the siding is a siding not belonging to the Lancashire and Yorkshire railway company, do? In 1866 he granted a lease to this railway company of this very siding for a term of 996 years at a nominal rent of a penny a year. That is what he did. That is a strong fact to commence with—that he granted a lease of this very siding, which he is now saying is not a siding belonging to the railway company, for a term of 996 years to the railway company. But there were some provisions in that lease, and the provisions in that lease were these: that the trader, the present applicant, was to have a very large use of that siding. I agree to that, but the question is, as I think Mr. Justice Wright put it, whether or not this siding is not a siding belonging to the railway company, subject to the easement which the trader might have as and when he wanted to use that siding, for the purpose of taking his goods *ex* rail, or rather *ex* siding, into his own works, in proximity to the siding. I think the true view of the facts is simply this—not to say that that siding is not the siding of the railway company; it is a siding belonging to the railway company, but it is property belonging to the railway company subject only to this—that an easement has been granted by them to the trader to use the bridge as and when he requires it for the purposes of his trade. That being so, I agree with my brother Wright, and I think he is quite right in deciding as he has done, and therefore the appeal must be dismissed with costs.

LORD JUSTICE VAUGHAN WILLIAMS: I agree. I do not think it is possible here to have any doubt about the facts. The fact is that this is a siding which belongs to the railway company not

only in the sense that they are lessees entitled to the possession of it, but also in the sense that they are entitled to the user of this siding subject to the easement they have granted to the applicant. That easement is a very large one, but at the same time I cannot see that it is so large as to enable one to say that this siding does not belong within the meaning of section 4 of the Act of 1894 to the railway company. I should have been glad myself if I could have been satisfied what the object was of the legislature in limiting the operations of section 4 to cases of disputes arising in respect of these terminals at any siding or branch railway not belonging to the railway company. But although I am not satisfied as to what the object of the legislature was, this much at any rate is clear: that the section cannot have intended to exclude from it cases in which disputes arise between a person entitled to the use of a siding under an easement—because if it did that, practically the section would have no application at all.

LORD JUSTICE ROMER concurred.

[Solicitors for the applicants: *Pritchard, Englefield & Co.*, agents for *Costeker*, Darwen.

Solicitors for the railway company: *Woodcock, Ryland and Parker*, agents for *Moorhouse*, Manchester.]

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AND OTHERS

v.

THE LANCA-
SHIRE AND
YORKSHIRE
RY. CO.

Vaughan
Williams,
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GIRARDOT & Co.

r.

GREAT EASTERN RAILWAY COMPANY ⁽¹⁾.

Rebate on Siding Rates—Siding “not Belonging to the Company”—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 4.

May 25,
1900.

An ancient siding was situated on a railway company's land, and ran parallel to their main line, upon the same embankment, and had been constructed by the railway company. The railway company conveyed land for building maltings to the applicants upon the terms (*inter alia*) that they should have “full and free right and liberty at all reasonable times and in all reasonable ways to use without charge the railway siding for the purpose of conveniently forwarding and receiving and conveying all goods and commodities,” and undertook to place in a convenient part of the said siding all trucks destined for the applicants, and also on request to remove and forward them with all reasonable expedition; the railway company further undertook to maintain the siding in good repair.

Held, that the siding was a siding “belonging to the railway company.”

THIS was an application under section 4 of the Railway and Canal Traffic Act, 1894 ⁽²⁾. The material part of the application was as follows:—

1. The applicants are the owners of maltings erected upon land at Bury St. Edmunds which abuts upon the premises of the respondents, and are also the owners of a perpetual easement and of rights over the respondents' said premises as hereafter explained. They claim under the circumstances hereafter stated to be entitled to a rebate in respect of traffic passing to or from their said maltings and land over the respondents' railway.

2. The said land easement and rights were granted and conveyed to William Downes (the predecessor in title of the applicants) for the sum of 350*l.* by the Eastern Union railway company (the predecessors of the respondents) by an indenture

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

⁽²⁾ Section set out in head-note to *Huntington and Others v. Lancashire and Yorkshire Railway Company*, *ante*, p. 237.

dated the 1st of February, 1854, to which the applicants crave leave to refer.

3. The following is an extract from the said indenture: "And the said Eastern Union railway company do grant, bargain, sell and release, convey and confirm unto the said William Downes and his heirs all that piece of land or ground now used as a coal wharf; and also full and free right and liberty for the said William Downes, his appointees, heirs and assigns, and the owners and occupiers for the time being of the above described premises, and his and their servants at all reasonable times and in all reasonable ways to use the slope of the embankment of the railway and the coal shoots thereon, and all other (if any) the ground situate lying and being between the hereby conveyed piece of land and the main line of railway for the purpose of loading or unloading goods and commodities, the said William Downes, his appointees, heirs or assigns, or the owners or occupiers of the hereinbefore described premises or their servants creating no obstruction to the said company's traffic thereby; and also full and free right and liberty for the said William Downes, his appointees, heirs and assigns, and the owners and occupiers for the time being of the above described premises and his and their servants at all reasonable times and in all reasonable ways, to use without charge the coal drop hereinafter mentioned, and the tramway or railway siding now and for a considerable time past existing and extending from the main line of the said railway to and alongside of the above described premises, for the purpose of conveniently forwarding and receiving and conveying all goods and commodities to and fro between the said main line and the said hereinbefore described premises, the said company, their successors and assigns hereby undertaking to place in a convenient part of the said coal drop and tramway all trucks containing goods or commodities destined for or required or intended to be unloaded at the said above described premises, and also on request to remove and forward with all reasonable expedition to their respective destinations all trucks containing goods or commodities loaded at or consigned from the said above described premises without extra charge beyond their accustomed tariff for the time being to or

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from their Bury station, the said company hereby undertaking for themselves, their successors and assigns, at their own expense for ever hereafter to maintain and keep the said tramway or railway siding in good repair" . . . and then follow the usual words vesting the said premises and rights in William Downes for an estate in fee simple.

4. The said indenture also contained the following covenant by the Eastern Union railway company: "And the said Eastern Union railway company for themselves, their successors and assigns, do hereby covenant with the said William Downes, his heirs and assigns, in manner following (namely):—That they, the said company, their successors or assigns, shall and will at their own costs for ever hereafter maintain in good and sufficient repair the said now existing tramway or railway siding between the main line of the said railway and the hereditaments and premises hereinbefore described. And also shall and will permit the use of the said tramway by the parties and in the manner hereinbefore designated, stipulated and provided."

9. The applicants maintain and the respondents deny that, having regard to the easement and rights over the original siding purchased in the year 1854 and now vested in the applicants, the said original siding is in respect of all traffic of the applicants loaded or unloaded thereon a "siding or branch railway not belonging to the company" within the meaning of section 4 of the Railway and Canal Traffic Act, 1894.

The respondents in their answer did not admit that the applicants were the owners of a perpetual easement over the respondents' premises, and denied that the siding came within the section.

C. A. Russell, Q.C. (Whitehead with him), for the applicants.

The railway company sold the land upon which the maltings were subsequently erected, and gave the largest rights they could, having regard to the necessity of retaining the ownership of their own embankment, to the trader as part of the consideration for the sum of money which he paid under the conveyance. There is not any express reservation of right to the railway company

to use this siding. It is a question of construction ; and here you have perpetual right of exclusive user given to the trader. In the case of *Huntington v. Lancashire and Yorkshire Railway Co.* ⁽¹⁾ the siding was not in existence, and the trader sold the land upon which the siding was to be placed to the railway company. Here the trader would not have bought the land at all unless he could have got with it what was to be his siding, and that which would enable him to use it, namely, the rights over the intervening land. The stipulation as to the railway company placing and removing trucks from the siding show the parties considered that it had passed out of the railway company's hands.

C. A. Cripps, Q.C., and Nicoll, for the railway company, were not called on.

WRIGHT, J.: I do not think there can be any reasonable doubt that the siding belongs to the railway company. It is an old siding which existed before the agreement made in 1854. The siding is on the company's land, as I gather, actually on the top of the embankment on the company's own land, and it is maintained by the company. Even so, still if there had been an exclusive user given to the present applicant, we should probably have thought that the siding ought not to have been treated as belonging to the company at all ; but here I do not find anything in the agreement which gives any exclusive use to the trader, and I see nothing in the agreement from which any right of exclusive use can be implied. On the contrary, it seems to me that it is excluded by the railway company, as by the very terms of the agreement itself they run over those sidings to deliver goods, and to take away in trucks, and so on. Now, contrast this case for the moment with *Pidcock's Case* ⁽²⁾. Take these three things ; who is the owner of the land on which the siding is made, who made the siding, who maintained the siding, who has the primary use of it, and who has the limited use of it ? In *Pidcock's Case*, it was held the

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⁽¹⁾ *Ante*, 237.

⁽²⁾ *Ante*, Vol. IX. 45.

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adjoining trader must be treated as the owner of the siding. There he was the owner of the land; he made the siding; he maintained the siding; he had the primary use of it; and the company had only the limited use of it for shunting, and that only subject to the reasonable use by the trader of the siding for the goods the trader dealt in. Here it is exactly the reverse. Here the owner of the siding is not the trader but the company. It was made not by the trader but by the company. It is maintained, not by the trader but the company; the primary use of it is not in the trader but in the company, and the limited use of the line in this case is given to the trader. I do not think we could possibly hold that this siding belonged to the trader, and if it does not, it belongs to the railway company.

[Solicitors for the applicants: *E. F. and H. Landon.*

Solicitor for the Great Eastern railway company: *E. Moore.*]

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v.

MIDLAND RAILWAY COMPANY AND OTHERS ⁽¹⁾.

Rebate on Siding Rate—Station Accommodation and Terminal Services—Jurisdiction—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 4—Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891, section 5 of the schedule.

The applicants were the owners of sidings which connected their works at Sheffield with the railway of the Midland railway company, and the applicants complained that in respect of traffic passing to or from such sidings, they were charged rates of the same amount as were charged to traders whose similar traffic was dealt with at and made use of the Midland railway company's goods station at Sheffield, and they applied under section 4 of the Railway and Canal Traffic Act, 1894, for a rebate in respect that the railway company did not in the case of the siding traffic provide station accommodation or perform terminal services.

April 19, 20,
May 23,
1901.
July 24,
1902.

The railway company admitted the equality of the rates, but denied that the rates charged on siding traffic included any charge for a station or service terminals at Sheffield. They contended that the Commissioners had no jurisdiction to entertain the complaints, on the ground that the majority of the rates complained of were within the railway company's powers of charge for conveyance and terminals at one end only, and that the remainder of the rates complained of included charges for services at or in connection with sidings.

Held, that there was evidence that the rates in fact included terminal charges, and that the applicants were entitled to a rebate of the whole service and one-quarter of the station terminal.

Semble, that the Commissioners have jurisdiction under section 4 of the Railway and Canal Traffic Act, 1894, to allow a rebate without proof that any definite amount of terminal is included in the rate, and that *primâ facie* it is enough to found jurisdiction under that section if it is shown that, in respect of similar traffic between substantially the same termini and passing over substantially similar routes, a sidings' trader, who does not require or use any terminal accommodation or services, is charged the same amount as a trader who uses the station.

Held, that under section 4 of the Railway and Canal Traffic Act, 1894, there is power to take every circumstance into consideration, and whether or not the railway company do anything for which they might claim an allowance outside the termini of conveyance under their Rates and Charges Act (*per* WRIGHT, J.).

Held, that where a train by which sidings' traffic arrives conveys it as near to its destination as such a train on that particular portion of line can be

⁽¹⁾ Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBBAM, sitting at the Royal Courts of Justice, London.

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reasonably expected to come, and deposits it for delivery at the point best fitted for that purpose, the transit from that point to the sidings is a service of delivery rather than conveyance, and where such delivery cannot be performed at the cost ordinarily incidental to it, it is among the services for which an addition to the tonnage rate may be allowed (*per* SIR FREDERICK PEEL).

Held, further, that the method of ascertaining the amount of the terminals by assuming them to be in the same proportion to the rates actually charged as the maximum terminals would be to the amount of the maximum sums chargeable for conveyance and terminals (!) could not be adopted as a general rule; since it would necessarily be wrong whenever the cost and value of the terminal accommodation and services were very low or very high as compared with the cost of conveyance. A preferable method would sometimes be to refer to the station terminal any excess over the maximum conveyance rate (*per* WRIGHT, J.).

Held (by the Court of Appeal), that the Railway Commissioners having agreed on the facts that a certain sum should be allowed as a rebate, there was no jurisdiction to raise the question of law as to whether it must first be shown that the charge in respect of which the rebate was claimed had in fact been made.

THIS was an application under section 4 of the Railway and Canal Traffic Act, 1894.

The applicants manufactured steel goods at works at Sheffield connected with the Midland railway by means of a siding not belonging to the railway company.

The applicants complained that the rates charged to them were the same as those charged to traders whose similar traffic was dealt with at, and made use of, the goods station of the Midland company at Sheffield, although the latter did not supply station accommodation nor perform terminal services in connection with the applicants' traffic.

The railway company admitted the equality of the rates, but denied that they had included charges for station accommodation or terminal services, and submitted that the services rendered and the accommodation provided by them at or in connection with the applicants' siding justified the equality of charge.

The applicants applied to the Court to decide what were the reasonable and just allowances to be made from the rates charged.

Balfour Browne, K.C., Asquith, K.C. (Whitehead with them), for the applicants.

Tennant & Co. v. Caledonian Railway Company and North British Railway Company ⁽²⁾ is an authority for saying that when

(1) *Ante*, Vol. IX. 45.

(2) *Ante*, Vol. X. 194.

a station is used, a charge for it may be presumed. A railway company cannot justify by merely saying the charges are under the maximum. The same services are done in all cases, whether or no the charges are within the conveyance maximum. If only the conveyance rate is charged, the traders at the station still get much more done for that rate.

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Cripps, K.C. (Noble with him), for the railway company.

The applicants must prove a station or service terminal is in the charge. 85 per cent. of the rates complained of are covered by the maximum conveyance rate only. In the remaining 15 per cent., the services performed are equivalent in cost and value to what is done at the station; twenty miles of sidings have to be provided by the railway company for this traffic, and accommodation for 100 trucks is allocated to the applicants alone; six engines are engaged all day. There might be an allowance of half the service terminal due. *Salt Union, Limited v. North Staffordshire Railway Company* ⁽¹⁾ shows that the mere giving of evidence by a trader that he pays a certain sum does not create any *prima facie* liability for illegality against the railway company; here, differing from that case, there is a comparable rate, but evidence has been given that that rate in nearly all cases, owing to the special conditions existing at Sheffield, was fixed with reference to the sidings and not to the ordinary station traffic, that is, without including the station or service terminal. This displaces the presumption raised by the rate. *New Union Mills Company v. Great Western Railway Company* ⁽²⁾ is an authority that the Court will not interfere with the exigencies of trade in respect of competition, and will not compel a railway company to say they perform for something a service which they choose to say they perform for nothing.

SIR FREDERICK PEEL: The applicants in this case have works at Sheffield, which are connected with the railway of the defendants by sidings not belonging to them, and complain that, as respects traffic passing to or from such sidings, they are charged rates of the same amount as are charged to traders

⁽¹⁾ *Ante*, Vol. X. 179.

⁽²⁾ *Ante*, Vol. IX. 152.

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whose similar traffic is dealt with at and makes use of the defendants' goods station, and they apply under section 4 of the Act of 1894 for a rebate in respect that the railway company do not in the case of the siding traffic provide station accommodation or perform terminal services. Appended to the application is a list of the principal rates complained of, 248 in number.

The equality of rates is admitted by the defendants, but it is denied that any of the 248 rates charged on siding traffic include any charge for a station or service terminal at Sheffield, and as regards 208 of them, or 85 per cent., the defence is that they are covered by the railway company's powers of charge for conveyance and terminals at one end only, and are therefore outside the scope of section 4 of the 1894 Act, while as regards the rest the part not so covered is, it is said, the company's charge under section 5 of their Rates and Charges Act of 1891 for services at or in connection with the sidings.

The first question then is, are 85 per cent. of these rates outside the Act of 1894 by reason of their amount being consistent with there not being in them any station or service terminal at the Sheffield end, and of there being no evidence that such terminals are included? That the section is not limited to cases where the rate takes in, as one element, a charge for expenses at a terminal station, but may entitle a person to a rebate where, for the same rate that other people pay, whether the rate is one entire sum or a sum in which there are particular portions for particular expenses, he does not receive the same station accommodation that they do, is a view which this Court has from the first kept itself free to take. I refer to what was said by us in the *New Union Mill Company v. The Great Western Railway Company* ⁽¹⁾, and in the *Salt Union, Limited v. The North Staffordshire Railway Company* ⁽²⁾, and it is a view also which Lord Justice Rigby and Lord Justice Vaughan Williams expressed themselves strongly in favour of in the same *Salt Union Case* on appeal ⁽³⁾.

⁽¹⁾ *Ante*, Vol. IX. 160.

⁽²⁾ *Ante*, Vol. X. 183.

⁽³⁾ *Ante*, Vol. X. 189, 193.

Considering then that at the Sheffield goods station traffic similar to the applicants' traffic is dealt with under circumstances which would justify the imposition of terminal charges, and that the station and siding rates are the same, although in one case terminal expenses are incurred and in the other are not, it is not, I think, an answer as to 85 per cent. of the rates complained of that there is no Sheffield station terminal in them.

Some of them, however, are for carriage of articles of unusual weight or requiring special truck arrangements, and these being of the exceptional class to which Part IV. of the Rates and Charges Act refers are as such excepted; but otherwise as to all the rates the question as to allowing a rebate depends upon whether what is done or provided by the railway company at or in connection with the sidings is, or is not, an equivalent for what they are relieved from doing or providing at the station. It is admitted by the defendants that the whole available space they have at Sheffield for dealing with goods traffic is altogether smaller than would be required if, in addition to the existing demands upon it, it had to be used for loading and unloading the traffic of private sidings, and that the accommodation given for that purpose at sidings not belonging to them is so necessary that without it the work could not be carried on. Indeed, the heavy traffic at Sheffield being mainly siding traffic is the reason, the railway company say, why the siding owners have rates for this class of traffic much below the company's powers of charge. Though applied equally to station traffic, the rates were fixed with reference to the great weight of the traffic originating with works having sidings connections. But though the defendants do not, and could not, provide the applicants' traffic with that for which a station terminal may be charged, they give it the use, and in practice the exclusive use, of two of their sidings capable of holding 100 trucks, and at these sidings they receive and deliver all trucks consigned from or to the applicants' works, the applicants undertaking the haulage between their works and these sidings. These sidings are the established place for the reception from the company of trucks with inwards traffic and for the depositing by the applicants of trucks with outwards

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traffic which they wish to be carried forward by the company. They are not wanted or used either for loading and unloading or for storing, but for the matter of getting goods to and from the works they are an almost necessary addition to the means of communication supplied by the applicants' own sidings. Some allowance therefore would be due to the company under this head. There appears to be also a good deal of sorting out of inwards traffic for the convenience of the applicants. The trucks, each with its particular traffic, arrive by different goods trains, and when detached from the train are first of all deposited in the Wincobank or engine-shed reception sidings belonging to the railway company, and they are then shunted together and made into a train for the applicants' works, not indiscriminately, but according to instructions received from the works as to class of traffic, particular coal, and number of wagons required. There is then the railway transit between the reception sidings and the applicants' works. This is done by engines of the railway company specially allotted to this kind of service, and the view which the railway company take of the cost attending it is that it is an extra for which they are entitled to charge separately, while the applicants contend that it is covered by the conveyance rate. The matter seems to turn upon whether the train by which the sidings traffic arrives conveys it as near to its destination as such a train on this particular portion of line can be reasonably expected to come and deposits it for delivery at the point best fitted for that purpose. This is, I think, what does happen in the present case, and the taking of the traffic from the reception sidings to the sidings and junction leading to the applicants' works seems to me to belong rather to the process of delivery than to that of conveyance, and as delivery in this case, owing to the crowded state of the lines which have to be crossed in the transfer of goods, cannot be done at the cost ordinarily incidental to it, I think it is in some sort among the services for which some addition to the tonnage rate may be allowed. As regards the service terminal, it is not disputed that, with the exception of armour plates, which being in Part IV. of the Rates and Charges Act it is not necessary to consider, all the applicants' traffic is loaded and covered by

themselves, and traders who do not require a railway company to load or cover for them ought not to pay the same rate as traders for whom the company perform that service.

Lastly, as to the respondents' claim for the provision of wagons and sheets as between their sidings and the applicants' works, meaning, I suppose, the use of them inside the applicants' premises, though it is true a company is not bound to travel off its own line, still, where, as in this case, want of space prevents the loading and covering of traffic on the company's land, a charge for allowing trucks to stand where that work can be carried on would not be reasonable.

In determining under section 4 of the Act of 1894 what would be a just and reasonable rebate off any actual rate, we require to know what proportion of the rate would be the maximum rebate. The proportion it has been usual for us to take is that bearing the same ratio to its total amount as the maximum for station and service terminals bears to the sum of the maximums for conveyance and terminals, the rebate allowed out of this proportion varying with the extent that the company do not provide station accommodation or perform terminal services, but with due regard to the value of other things they may do in course of dealing with sidings traffic. In the present case the annual tonnage using the Sheffield goods station is 580,000 tons, and that using the applicants' and other private sidings 1,100,000 tons. Every ton of the applicants' traffic is loaded or unloaded by themselves and on their own premises, and that they thus employ their own sidings saves, of course, the railway company a deal of expense, for an enlargement of the goods yard proportioned to the increase of tonnage which would arise from taking in sidings traffic, would require a large outlay. On the other hand, there is the delivery of traffic to and from the private sidings in the mode to which I have referred, and which, as to cost, the defendants consider to be the same as when similar traffic is consigned at the goods station. For this, then, a deduction has to be made from the amount of rebate to which the applicants could otherwise lay claim. As bearing on what would be a proper deduction, it may be observed that the traffic of the goods yard is dealt with

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generally in a similar way, put, that is, first into reception sidings and hauled thence to the goods station, and that the expense of this service is one of those expenses which are defrayed out of the station terminal. What, then, the company themselves charge, or may be assumed to charge, when the delivery is into the goods yard, affords evidence of what would be a reasonable charge when the delivery is in connection with the private sidings, and, on the whole, I am of opinion that the just rebate in this case will be the whole service and one quarter of the station terminal, the amount to be taken as the charge for terminals being ascertained on the principle adopted in *Pidcock's Case*.⁽¹⁾

In the applications of Messrs. Cammell's and the other firms, the points that arise for decision are identical with those in the *Vickers Case*, and the circumstances in connection with the working of their traffic are very similar, and I think that they should each have the same rebate as allowed to Messrs. Vickers & Co.

LORD COBHAM : I think that for the purposes of this inquiry it must be held that station terminals, and, except in Classes A and B, service terminals, have been charged by the Midland railway company to Messrs. Vickers upon the traffic set forth in their application to and from their sidings at Sheffield. As these are sidings not belonging to the railway company, no charge for station terminals, as such, can legally be made. Further, Messrs. Vickers have shown that the company perform no services for which service terminals can be charged. They ask, therefore, that a rebate should be allowed them corresponding with the amount of the terminals charged, ascertained upon the proportional principle adopted in *Pidcock's* and other cases.

Although the railway company must be held to have failed in their contention that they have not charged Messrs. Vickers any terminals in a large proportion of the cases complained of, and that there should in these cases, therefore, be no rebate, they may, and do, claim a set-off under section 5 of the Railway Charges Act in respect of services rendered "in connection

(1) *Ante*, Vol. IX. 45.

with a siding," and, further, under section 4 of the Act of 1894 they ask us, upon a review of all the circumstances of the case, to "determine what, if any, is a reasonable and just allowance or rebate." As the latter section not only gives us all the discretion allowed us by section 5, but a good deal more, it is under it rather than under section 5A that I think the case should be dealt with.

The traffic of Messrs. Vickers, and of the other applicants owning sidings in Sheffield, is exceptional, both in character and amount. In the first place, there is a class of heavy traffic (in the case of Messrs. Vickers one-fourth of the whole outwards traffic), mainly armour plates and guns of so special a character that it is not subject to a maximum rate, and the railway company is only bound to make reasonable charges in respect of it. I concur in the view that no case has been made for interference with the charges made for this traffic, which appear to be reasonable. Another point to be noted in regard to the sidings traffic is the great preponderance of inwards over outwards traffic. This is represented in Messrs. Vickers' case by the figures 18,500 tons inwards per month against 1,100 tons outwards. In Messrs. Cammell's case six separate trips per day are required to clear the outwards traffic alone. Under such circumstances as these, it is clear that unless very adequate provision is made both by the railway companies and the traders, blocks and delays must take place, and that this does in effect happen was, I think, clearly shown in Messrs. Cammell's case.

Lastly, the amount of Messrs. Vickers' traffic, and that of the other applicant sidings owner's traffic, is extremely large, being no less than 1,100,000 tons a year, which, together with 580,000 tons of station traffic, is dealt with on a length of railway not exceeding $8\frac{1}{4}$ miles. Too much stress should not be laid upon the mere magnitude of the traffic. It may often happen that upon the more crowded portions of their lines railway companies, having regard to the exigencies of their traffic as a whole, may think fit, or, indeed be obliged, to provide siding accommodation wholly or in part for the use of individual traders supplemental to the accommodation provided by those traders for themselves. Again, they may, as in this case, employ special engines to marshal the wagons, and get them in

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and out of the private sidings, in order to economise time, which is as important to them as to the trader. All this, of course, involves heavy outlay; but the receipts from the traffic are large, and I do not doubt that as a rule they are quite proportionate to the outlay. I can therefore see no valid reason why these services, performed, as they are, during conveyance, and therefore *primâ facie* "incidental to conveyance," should not be regarded as covered by the conveyance rate.

In saying this, however, I am assuming that not more than a reasonable share of working the traffic is thrown upon the railway companies. The private sidings, as regards their position and arrangement should be reasonably adapted for the interchange of traffic with the adjoining railway, and the traffic itself should be so dealt with by the traders, and be of such a character as not to require from the railway company services of an unreasonably onerous kind. So far as these conditions are not fulfilled the extra cost of the services occasioned thereby imposed upon the companies should in fairness be recovered from the traders. I have no doubt that Messrs. Vickers and the owners of the other great works in their neighbourhood have done their best to facilitate the working of their immense traffic to and from their sidings. But these works were established many years ago, and while their business has greatly increased, their close juxtaposition has made their corresponding development a physical impossibility. Hence, while the railway company has done much with the difficulty thus caused, it does not appear that the traders have done their share in the necessary work. It is no hardship, therefore, to them that they should have to pay the railway company for doing what they themselves ought to have done, and no doubt would have done, had it been possible.

This, it seems to me, is one of the most important points that should weigh with us in determining "what, if any, is a reasonable and just allowance or rebate" to be made in this case. But regard must also be had to the material fact, that in two at least of the cases before us, there are sidings belonging to the railway company which form an indispensable connecting link between the running lines of the railway and the private sidings, and are exclusively devoted to the service of the applicants'

traffic. The railway company is clearly entitled to payment for the use of these sidings by the traders, and also for the clerkage in connection with their traffic. It is of course impossible to estimate with exactitude the value of services rendered in working the immense traffic of the Sheffield sidings by the traders and railway companies respectively, but I have done my best to give due weight to all the considerations applicable to the case, including those adduced by Sir Frederick Peel, and I see no reason to differ from his conclusion—namely, that Messrs. Vickers and the other applicants (for I see no adequate reason for distinguishing between them) are entitled to a rebate equal to one-fourth of the station terminals which we take to have been charged them, calculated upon the proportional principle, plus the whole of the service terminals taken to have been charged, ascertained in the same manner.

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WRIGHT, J. : I have only a few words to add. Under the Act of 1894, section 4, if it were necessary to decide upon that point. I should hold that that section gave jurisdiction to allow a rebate even without proof that any definite amount of terminal is included in the rate. *Primâ facie* it is enough to found jurisdiction under that section if we can see that in respect of similar traffic between substantially the same termini and passing over substantially similar routes, a sidings trader who does not require or use any terminal accommodation or services is charged the same amount as a trader who uses the station. I do not say that it would in every such case be right to allow a rebate, but I think we should have jurisdiction to consider the matter on its merits.

However that may be in this case there is evidence that the rate in fact includes terminal charges. Letters from the manager of the railway company were produced, one dated the 28th June, 1899 ⁽¹⁾, which go very far to admit that the

(1) The applicants produced a letter sent to them by the general manager of the railway company dated June 28th, 1899, to the following effect:—"All our Sheffield rates are quoted at low figures, below authorised charges, and are applicable to all sidings at Sheffield as well as to the station. It would not be to your interest or to that of any large manufacturing firm in Sheffield that any other plan should be adopted. If we were to attempt an accurate but complicated system of rates varying according to the position of each siding the

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terminals are included in the rates. It is at any rate admitted that terminals at the other end are included in all or most of the rates in question, and in a considerable number of them it is admitted that something, though of a very trifling amount, must be taken to be charged at the Sheffield end also. Further, in the case of station traders there cannot be any doubt that terminals are included, and the same rate being charged to siding traders it would follow either that terminals are charged to them also or that a higher conveyance rate is charged to them without any justification, which we ought not to assume. I conclude that all the rates, though not all built up expressly on the basis of a charge for terminals, do in fact include something for terminal charges, and it would follow that *primâ facie* there ought to be some rebate in favour of the applicants, whose traffic does not ordinarily require, or use, station accommodation or station services. The questions, therefore, are, how much ought to be allowed as a *primâ facie* rebate, and how much ought to be, on the other hand, allowed to the railway company, if anything, under the 5th section of their provisional order. Under the 4th section of the Act of 1894, I think we have power to take every circumstance into consideration, and whether or not the railway company does anything for which it might claim an allowance outside the termini of conveyance under their provisional order, we can consider the matter under the 4th section of the Act of 1894.

The only point on which I really differ at all from the rest of

services rendered thereat, and various other considerations, such as its liability to or freedom from competition, the present figures would be increased rather than diminished, as the extra cost involved in working under such a system would have to be paid for. I am quite aware that by law each separate siding owner has a right to have all the details of the working of traffic to and from his particular siding specially considered by the Railway and Canal Traffic Commissioners, and an appropriate siding charge determined, but as a practical question at places like Sheffield, where the great bulk of the traffic goes to and from sidings, railway business could scarcely be carried on upon such a system, and we have tried to meet the difficulty by putting rates on a low basis, and making them applicable all round, at the same time retaining the present favourable rates for the special traffic from Sheffield, such as heavy armour plates and other exceptional consignments which are outside the limitations of the Rates and Charges Acts. You will readily understand that under these circumstances no question of rebate on siding traffic can be entertained."

the Court is this. I do not think that the rule known as the rule in *Pidcock's Case* can be treated at all as a general rule. It has been used in some cases, and rightly used, no doubt, because there are many cases in which, *prima facie*, it may be a fair rule to adopt; but to my mind it is clear that it cannot possibly be in itself a general rule. Where there is nothing to the contrary I have nothing to say against it, though probably it is never consistent with the real facts of any case, except in a case (if there be one) where the aggregate rate equals the maximum aggregate of possible charges for conveyance and terminals. It is necessarily wrong whenever the cost and value of the terminal accommodation and services are very low or very high as compared with the cost of conveyance. For instance, supposing a case where the maximum of conveyance is 2s., and the maximum of terminal is 2s.; and suppose the conveyance actually costs the company 3s., and the terminal costs them 1s. The rate is 4s. In such a case, according to the so-called rule in *Pidcock's Case*, the sidings trader might, or must, get a rebate of 2s. though he saves the company only 1s. So, on the other hand, the terminals may cost and may be worth very much more than the maximum charge for them, and the unfairness may be as great the other way. In this particular case it seems to me probable that the saving to the railway company in respect of station terminal is at least equal to the maximum charge for that terminal. It is admitted that the existing station could not possibly provide accommodation for more than a fraction of the traffic of the applicants and of other neighbouring siding owners, and the cost of providing accommodation for the bulk of that traffic would be ruinous to the railway company. So, on the other hand, the cost to the applicants of their provision of their own station has been very great. *Primâ facie* I should say that a rebate of the whole of the station terminal, or of so much of it as the applicants ask, in conformity with the precedent in *Pidcock's Case*, would not be excessive here. As to the service terminals, if they are charged there will be no doubt about allowing a rebate, but I doubt in this case whether they ought to be treated as charged at all. I should not have

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applied the rule in *Pidcock's Case* to this extent; I should have preferred rather to refer to the station terminal any excess over maximum conveyance rate. Again, although *primâ facie* I think the station terminal should, as a whole, be allowed, I think something should be allowed under the Act of 1894 to the railway company in respect of the fact that they have provided a station which the applicants can use if they require, and which they do and must to some extent use, and the provision of which would not, in any approximate degree, be proportionately paid for by the terminal on the traffic of the applicant which in fact uses it. The allowance to be made on that ground is necessarily speculation. There may also be other allowances to be made to the railway company under section 5 of their provisional order, or indeed under section 4 of the Act of 1894 itself. I do not propose to discuss the amounts. I do not dissent at all from the conclusion of my brother Commissioners. I think the result at which they have arrived will, in this case, be a fair result, though I should not have got at the figures quite in the same way. I do not myself think that justice could be done on the exact lines of my brother Commissioners' judgments if the goods were of the higher classes, and the authorised service terminal therefore high. I should hesitate much before applying the rule in *Pidcock's Case* to Classes 3, 4 and 5 (12*d.*, 16*d.* and 20*d.* for the terminal) without consideration of the length of mileage and many other circumstances.

The railway company appealed against this decision.

The same counsel appeared as before the Commissioners.

COLLINS, M.R. : This is an appeal from the decision of the Railway Commissioners, in which each of the Commissioners, including Mr. Justice Wright, gave separate judgments.

The application is brought by Messrs. Vickers, Sons & Maxim, Limited, to have a rebate made to them under the 4th section of the Railway and Canal Traffic Act of 1894, on the ground that they are the owners of a siding not belonging

to the railway company upon which merchandise is received or delivered by the railway company.

Mr. Cripps, for the appellants, the railway company, is very desirous of raising a point of law as to the true construction of the 4th section, the point of law being broadly, whether you can order a rebate under that section unless you first show that some charge for that which is claimed as a ground of rebate has been in fact made to the applicants at their siding. That, no doubt, is a very important point of law, and is a point upon which the learned Commissioners do not appear to have agreed themselves.

Sir Frederick Peel gave a judgment which is undoubtedly based on a construction of the section which Mr. Cripps impugns—that is to say, the learned Commissioner held that whether there was any charge embraced in fact for station or service terminals in the rate charged to the applicants, there is jurisdiction under section 4 to make a rebate. Sir Frederick Peel, in pursuance of his judgment, did measure out the rebate, both in respect of station terminals and in respect of service terminals. Lord Cobham, who gave the second judgment, agreed that a rebate to the same amount as Sir Frederick Peel had suggested should be awarded in each case, but he arrived at his conclusion upon the finding as a fact that charges for both classes of service—station terminals and service terminals—had been in fact embraced in the rate charged to the applicants. So those two learned Commissioners were in accord in the result of their judgments.

Then came the learned Judge whose judgment has given us some little difficulty. The learned Judge has not made his opinion the basis of his decision, but he has said that if it did come up before him for consideration and were necessary to the decision he would agree with the view of Sir Frederick Peel, that the section is to be construed in the wide sense in which Sir Frederick Peel construed it. But in making that observation he obviously, and in fact in terms, says that that opinion is not necessary to the decision of the case, which involves this, that the facts do not oblige him to lay down the law in that way. Therefore he proceeds to deal with the facts, and he

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comes to the conclusion, undoubtedly, in point of fact, that a charge is embraced in the rate charged to the applicants in respect of a station terminal. He does certainly suggest a doubt as to whether service terminals are embraced in the rate or not; but he says, whether they are or not, he thinks that the amount which the other Commissioners thought ought to come off, might be properly attributed to station terminals alone. In point of fact he would have been prepared to attribute even more than the facts had admitted of; to that extent he does seem to exclude service terminals as a subject-matter of rebate. However, the net result of his judgment is that he does agree that a rebate to the full amount agreed upon by the other two Judges shall come off.

Where the Commissioners are agreed in fact, this Court has no jurisdiction to interfere with them. What they really had to decide in this case was, whether any rebate should come off and what the amount of that rebate should be. On the decisions, as I have shortly summarised them, it is quite clear that they are all agreed that a rebate should come off, and that they are all agreed as to the amount of the rebate. Under these circumstances it seems to me that we have no jurisdiction to interfere with their decision, and that this appeal must be dismissed.

STIRLING, L.J. and COZENS-HARDY, L.J. concurred.

[Solicitors for the applicants: *Neish, Howell, and Macfarlane*, agents for *Parker Rhodes & Co.*, Rotherham.

Solicitors for the Midland railway company: *Beale & Co.*]

GILSTRAP, EARP & Co.

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GREAT NORTHERN RAILWAY COMPANY AND MIDLAND RAILWAY
COMPANY (1).*Sidings Rebate—Date from which Recoverable—Railway and Canal Traffic
Act, 1894 (57 & 58 Vict. c. 54), s. 4.*July, 30,
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Where an allowance is granted by the Court under section 4 of the Railway and Canal Traffic Act, 1894, the allowance *prima facie* should begin from the date of the "application," and not from the date of the judgment, nor from a time anterior to the application.

Where a siding owner does not require station accommodation, it does not necessarily follow that he ought to have an allowance in respect of not requiring it, since sidings may be a great burden to a railway company, and each case must stand on its merits.

Where a railway company has no power to charge a station terminal, and yet the rate is shown to include something for a station terminal, the Court is not necessarily bound to allow a rebate, since section 4 of the Railway and Canal Traffic Act, 1894, gives it a wide jurisdiction to do justice free from technicalities.

In ascertaining the component parts of a rate the system adopted in the case of *Pidcock v. Manchester, Sheffield and Lincolnshire Railway Company* (2), whereby the service charges were deemed to be in the same proportion to the rates actually charged as the maxima service charges would be to the sum of the maxima rates, cannot be taken as an absolute measure; since, in a case like the present, where it is proved that no charge is made for loading or unloading, too little would be attributed to the cost of conveyance and to the station terminal.

THIS was an application under section 4 of the Railway and Canal Traffic Act, 1894.

The applicants were maltsters at Newark, who owned three different sets of sidings connecting with the respondent railway companies, at which they received grain and coke, and from which they despatched malt. The traffic was loaded or unloaded on the applicants' sidings.

They complained that although they did not use station accommodation at the Newark end of the journey, the rates charged included charges for such accommodation, as well as for terminal services at Newark.

(1) Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBBAM, sitting at the Royal Courts of Justice, London.

(2) *Ante*, Vol. IX. 45.

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The applicants had been paying the rates since January, 1893, up to the date of the application (April 10, 1901); but between April, 1897, and August, 1900, they had made deductions from their accounts.

On the 4th of April, 1901, the applicants gave notice of their intention, as from the 8th of April, to perform for themselves at the Newark end of the journey the terminal services of loading, unloading, covering, and uncovering.

The applicants asked for an order—

1. Determining what were the reasonable and just rebates to be made from the rates charged ;
 - (a) in respect of not providing station accommodation; and
 - (b) in respect that as from the 8th of April, 1901, the respondents did not perform terminal services.
2. Directing the payment to the applicants by the respondents of the amounts of such rebates.
 - (a) in respect of station accommodation as from January, 1893, after crediting themselves with the deductions made by the applicants on account thereof; and
 - (b) in respect of the terminal services as from the 8th of April, 1901.
3. (Alternatively), declaring what portions of the rates charged since January, 1893, had been illegal, as including charges for station terminal at Newark, and enforcing payment of so much thereof only as should be declared to be lawful.
4. (Alternatively), 2,250*l.* damages. ⁽¹⁾

⁽¹⁾ In the case of *Simonds & Co. v. Great Northern Railway Company*, heard at the Royal Courts of Justice, London, on November 22, 1900, Mr. Justice WRIGHT, in giving judgment, said: "I am very far from saying there may not be cases in which a retrospective claim for damages may not be made out by an applicant under the 4th section of the Railway and Canal Traffic Act, 1894, which appears to be a section giving or restoring jurisdiction, and not creating new subjects of jurisdiction. It creates a new subject of jurisdiction in so far as it provides for our discretion in granting a rebate, and in cases of that kind I should think probably damages could not be given for anything except disobedience to our order; but the jurisdiction given by the section extends to other matters besides—to matters of allowance in respect of the non-performance of services which may not depend upon our discretion at all. I should

The railway companies denied that the rates charged included any charge for station or service terminals. They stated that the rates were exclusive of loading and unloading, and they contended that the "delivery" of the traffic, within the meaning of section 4 of the Railway and Canal Traffic Act, 1894, took place at Newark station, where the practice was as follows: The applicants' traffic was consigned to Newark station without any direction as to which of the applicants' premises it had subsequently to be sent to; a notice of arrival was then sent to the applicants, whose representative then came to sample the grain, and to state which trucks were required for the day's business, and to which premises each particular truck was to be forwarded. Trucks frequently remained for several days in the goods yards, and were finally shunted by the railway company's engine, and hauled to the applicants' premises. The following services were then rendered after the trucks were left on the applicants' premises, viz.: A man and horse were provided for moving and placing wagons to suit applicants' convenience. Up to April 8th, 1901, the following additional services had been rendered: A man was provided to stand in the truck and to assist in unloading; and a man was provided to unsheet the wagons and check the traffic. The outwards traffic entailed similar services on the railway companies.

The railway companies claimed that, if the applicants were entitled to any rebate, the special services and accommodation provided for the applicants' traffic were more than equivalent to what they were relieved from providing; and that if any of the services between Newark station and the applicants' premises were part of the service of conveyance, they were entitled to make a considerably higher charge for conveyance of traffic to the applicants' premises than they charged for conveyance to Newark station, upon the ground that the conveyance was more expensive as well as the distance longer, and that the extra charge which might be made for conveyance was not limited by

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think there is probably jurisdiction to award damages under the 12th section of the Railway and Canal Traffic Act, 1888, as well as under any other section; at any rate, I should be very slow to decide there was no power to award damages under that section."

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an addition proportional to the extra distance, so long as the amount charged for conveyance was within the charging powers of the company for the total distance for which the traffic was conveyed.

Asquith, K.C. (*Whitehead* with him), for the applicants.

If "delivery" is made at Newark station, the case of *Pidcock v. M. S. & L.*⁽¹⁾ is wrongly decided. Here there is a slight degree of extra shunting or haulage, and the railway companies desire to charge as if they performed the whole terminal services. A trader who has at considerable expense put in a siding of his own is to get no advantage whatever. There is a public loading-shed close to the applicants' siding, the rates to which are the same.

Balfour Browne, K.C., C. A. Cripps, K.C., and Ernest Moon, appeared for the railway companies.

The judgment of the Court was delivered by Wright, J.

WRIGHT, J.: This is a case of importance, and of some difficulty. First of all I will get rid of the question of service terminals. It is plain on the evidence that there is no case made to show that the railway companies are charging for loading and unloading. It is proved that they are not; but if, and so far as anything is to be taken as included in this rate for covering and uncovering any traffic which comes to them, they ought to have some allowance—whether a halfpenny or whatever the sum may be, there will probably be no difficulty about that. If necessary, an application can be made as to that.

I will only say on that question that, on consideration, it seems to me that where this Court makes an allowance to an applicant under section 4 of the Act of 1894, *prima facie* that allowance ought to begin at the date of the application on the one hand, and not merely as at the date of the judgment; on the other hand, it should not be from any time anterior to the application, because, in my view, no wrong has been done to the applicant until this Court decides that an allowance ought to be made. But that allowance ought to date from the date of the application.

Now we come to the station terminals, which is a much more

(¹) *Ante*, Vol. IX. 45.

serious question. It is serious in this way: If the question were simply this—whether the railway companies were illegally charging a station terminal, even in cases in which the conveyance maximum is not exceeded, there would be evidence here that would justify us in finding, as we found in other cases, that something is charged for station terminals, and that, therefore, *prima facie*, the applicants should succeed to the extent to which we may find, either on the “Pidcock principle,” as it is called, or on any other principle, that a station terminal has been included. Before I go on, I may point out that, without the slightest wish to disagree with that “Pidcock principle” as a practical guide, this case is a very good illustration to show that the Pidcock rule cannot be taken as a principle or an absolute measure, because here it is proved that no charge is made for loading and unloading; and yet, if the “Pidcock principle” were strictly applied, it would be necessary to attribute a portion of the charge to loading and unloading, with the result that a less amount would be attributed to the cost of conveyance and a less amount to the station terminal than the truth of the matter required. I only point that out in passing, not to minimise the consequences of the Pidcock rule, but only to point out again that it is not in itself conclusive. But, apart from that, it seems to me it does not follow that, because a company has no power to charge a station terminal, and yet in some sense does include something for a station terminal—I say it does not follow, where the total charge is not beyond the powers of the company, that we are bound to allow a rebate in a case like the present one. In my view, section 4 of the Act of 1894 enables us to do justice without regard to mere technicalities of that sort. That section says, whenever a dispute arises in relation to any “rebate to be made from the rates charged to such consignor or consignee in respect that the railway company does not provide station accommodation, or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate.” I think that does not merely enable us to make an allowance to a trader, but it enables us to get over technical difficulties that may stand

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in the way of our doing justice to the company as well as to the trader. That is my view.

There is no advantage in going in detail into the circumstances of this case. I think we are all agreed that as regards Newark, taken as a whole, it is proved that the railway companies give an equivalent for anything that ought to be imputed to them as charged in the station terminal.

As regards Peterborough, we think the applicants have succeeded as to a quarter, and the company has succeeded as to three-quarters of the station terminal as determined on the Pidcock principle, after correcting it by eliminating the loading and unloading.

I only wish to say one word more about the sidings. Of course, it may happen, and very often does happen, that the existence of a private siding may be undoubtedly of very great benefit to a railway company, as, for instance, may have been the case at Sheffield (¹), where the company cannot provide enough accommodation for the traffic themselves. On the other hand, the sidings may be a very great burden to a railway company. It may be a great benefit to the trader, and it may be a very great detriment to the railway company that the siding owner should be in a different position from the ordinary station trader. The station trader has to go for his goods to the goods depôt, or he may have to go to the arrival or departure platform, as the railway company reasonably find it convenient to deliver the goods; but the private siding owner insists on having the goods brought to his private house, so to speak, no matter what inconvenience there may be in crossing the line or in doing anything else. Therefore it does not follow that, because the siding owner does not require station accommodation, he therefore ought to have an allowance in respect of not requiring it. Each case must stand entirely on its own basis. We have done our best to consider what the merits are here, and we have come to the conclusion I have mentioned.

[Solicitors for the applicants: *Neish, Howell and Macfarlane.*

Solicitor for the Great Northern railway company: *R. Hill Dawe.*

Solicitors for the Midland railway company: *Beale & Co.]*

(¹) See *Vickers, Maxim v. Midland Railway Company*, ante, p. 240.

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v.

NORTH BRITISH RAILWAY COMPANY (No. 3) (¹).

Rebate on Sidings Rate—Who may Apply—Comparable Rate—Station Accommodation—Special Services at Traders' Siding—Jurisdiction—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 4—Railway Rates and Charges Order Confirmation Act, 1892, section 5 of the Schedule.

A trader is not prevented from complaining under the Traffic Acts of a rate for carriage of coal from a colliery to his siding by the fact that the rate is paid by the colliery owners, the trader himself having no account with the railway company; since the rate is included in the price paid for the coal by the trader, and the colliery owners, for the purpose of paying the rate, are the agents of the trader.

May 29, 30,
July 11,
1900.

December 10,
1901.

In order to make a station coal rate comparable with a siding coal rate, the coal traffic at the station must bear some reasonable proportion to that at the siding, so that where 97 per cent. of the whole coal traffic went to the siding, and only 3 per cent. to the station, the explanation of the railway company that the station rate was merely a "paper" rate was accepted.

A trader who received coal at a private siding applied to the Commissioners for a rebate from a siding-to-siding rate, upon the ground that the siding-to-siding rate exceeded the maximum rate for conveyance, and was the same in amount as the siding-to-station rate charged to a neighbouring station. The railway company stated in their answer that the siding-to-siding rate, in so far as it was in excess of the conveyance maximum, was not charged for station terminal services, but was a reasonable charge made for services rendered at both ends of the journey.

Held, by the Court of Session (affirming the decision of the Railway Commissioners), (1) that it was not a condition precedent to the railway company lawfully making such a charge at a private siding that its reasonableness should have been determined by an arbitrator in an application under the Railway Rates and Charges Order Confirmation Act; (2) that the Commissioners had jurisdiction under the Traffic Act of 1894, for the purpose of determining whether the rebate claimed should be allowed, to determine whether the charge made by the railway company for services at the sidings was reasonable; and (3) that the determinations of the Commissioners upon the questions raised by the answer of the railway company were determinations upon questions of fact, and consequently not the subject of an appeal.

THIS was an application under section 4 of the Railway and Canal Traffic Act, 1894.

The applicants, Messrs. Cowan, were paper manufacturers at

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Penicuik, and they complained that the North British railway company charged them the same rates for coal delivered at their sidings as they charged traders at Penicuik station, who received accommodation there. They contended that these rates included a charge for station terminal, which the railway company denied. They applied to the Court to determine: "What were the reasonable or just rebates to be made by the respondents from the rates charged by them to the applicants, upon coal traffic passing to the private siding of the applicants, in respect that the respondents did not require and would not be required to provide station accommodation or to perform terminal services," and they asked for damages.

The railway company said the coal rates charged included the rate for conveyance, and a charge in addition for services at the colliery end, and services at the Penicuik end, including the use of the railway company's wagons on the sidings at both ends. They also claimed to be entitled to be paid a reasonable sum for the special stop of their trains at Low Mill siding. They contended that the applicants had no valid claim to damages, since the charges for the conveyance of the coal in question had not been paid by them, but by the various colliery owners. They further contended that this was not a siding to which section 4 of the Railway and Canal Traffic Act, 1894, applied.

Ure, Q.C., and *Clyde* appeared for the applicants.

Dean of Faculty (Asher, Q.C.), *Solicitor-General (Dickson, Q.C.)*, and *G. Grierson* appeared for the railway company.

The arguments of counsel and the facts of the case are sufficiently stated in the following judgments:—

SIR FREDERICK PEEL: Messrs. Cowan's application is for a rebate from the rates they have been charged on coal delivered at their siding, in respect that station accommodation has not been provided. This is a different issue from that with which the former case between the same parties was concerned⁽¹⁾. There it was a question under section 5 of the North British Rates and

⁽¹⁾ *Ante*, Vol. X. 169.

Charges Act, 1892, of what it would be proper for the railway company to charge in addition to the tonnage rate for alleged special services at a siding not their own; here Messrs. Cowan claim, under section 4 of the Traffic Act, 1894, to have a deduction from their rate in consideration of their not using a station. The respondents raise a question of *locus standi*, and say that they do not carry coal for the public at large, but only for colliery owners, and that as all carriage of coal is paid direct to them by the colliery owner, Messrs. Cowan, with whom they have no account for carriage, fail in identifying themselves with the grievance of which they complain. As, however (whether the respondents as carriers of coals are free to choose their customers or not), the colliery owner in his account for coal sold to Messrs. Cowan adds to the price of the coal at the pit the sum paid for carriage, and the carriage rate is really paid by Messrs. Cowan, they are sufficiently interested in what is charged by the railway company to be entitled under the Traffic Acts to complain of anything in the charge which they consider to be contrary to those Acts. Now, the coal for Low Mill siding is carried from different collieries, but the Arniston colliery sends the largest quantity, and it appears that the rate from that colliery to the siding, where station accommodation is not provided, is the same as to Penicuik station, where it is provided. It also appears that the respondents revised their coal rates on the passing of their Rates and Charges Act, 1892, and that the principle on which the rates were revised and made up, was to charge the maximum for conveyance that their Act allows, and to add to this 2*d.* for terminals, or services at both ends, at or in connection with sidings not belonging to the company. More than two-thirds of their gross coal traffic being siding-to-siding traffic, it was for this traffic in particular that they fixed the rates, but the rates so fixed were also made applicable to their other or siding-to-station traffic, where such description of traffic was comparatively small and unimportant. The 2*d.* is, they state, much below the cost of siding services, which they estimate to cost them 3*d.* a ton at the colliery or forwarding end, and 3½*d.* at the delivery end, and as a separate charge the amount is low, and viewed apart from its equalling the station charge,

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could scarcely be disputed. But 2*d.* is also all that is extra to conveyance in the siding-to-station rate, and, like the charge of 2*d.* for the services at the two ends in the siding-to-siding rate, is partly for accommodation at Penicuik station, and partly for services at the colliery end. But the portion applicable to the station would not exceed 1*d.*, and 1*d.* per ton therefore is the maximum sum available for allowance as rebate, and if the question as to a rebate turned only upon what it should be actually put at, we might, though we have no jurisdiction to determine the payment for services in connection with sidings, require to consider whether a reasonable charge for such work would not absorb a good portion of the sum to which a rebate is limited. But, on the whole, I think no sufficient ground has been shown for any rebate whatever being allowed. There is no coal delivered at the station which competes with coal consigned to Low Mill siding, and the station accommodation therefore is not an undue preference warranting a lower rate for the siding under the Traffic Act, 1854. Nor is it, under the circumstances, a ground for rebate under the Act of 1894. The reason of the station and siding rates not differing in amount is that the quantity using the station is so small that the company did not think it worth while to have a rate of carriage for it differing from the siding rate. They had fixed a rate for the sidings where the coal traffic is very large, and rather than have a separate rate for a station traffic out of all proportion smaller, they made the siding rate applicable to it. Messrs. Cowan's coal traffic is about 97 per cent. of the whole coal traffic to Penicuik, including their own. In 1897 the tonnage to the station was 685 tons, and to Messrs. Cowan's siding 30,506 tons. The small tonnage dealt with at the station, has no doubt station accommodation for a rate no higher than the rate for coal carried to the siding, but for the reasons above stated I do not think this furnishes a ground for diminishing the charge for coal to the siding or granting a rebate from it.

LORD COBHAM: The applicants in this case, Messrs. Cowan, owners of the Low Mill sidings on the North British railway, ask that a rebate should be allowed them, under section 4 of the

Traffic Act of 1894, from the rates charged for coal consigned to their sidings from various collieries in the district. The onus of proving their claim lies upon them, and accordingly they bring evidence to prove that these rates, although siding-to-siding rates, include a charge for station accommodation. The fact upon which they mainly rely to establish their contention is the existence of what has been in previous cases called a comparable rate, that is to say, a rate in which there is a terminal element, but which in other respects is comparable with the rate in dispute. The Penicuik station rate for coal quoted for comparison in this case, except in one important particular, fulfils these conditions. The traffic in respect of which it is charged is collected from the same collieries, it is conveyed practically the same distance to a station near the sidings, and except that station accommodation is provided, it has the benefit of the same services as the coal delivered at Messrs. Cowan's sidings. The rates themselves are identical, and if we follow the principle laid down in *Tennant's Case* ⁽¹⁾, we must assume that the station rates include some charge for the station accommodation provided. It only remained for the coal traffic at the station to bear some reasonable proportion to that at the siding, and the applicants would have established by means of this comparison a very strong presumption in support of their case. But in point of fact the coal traffic at Penicuik station is wholly insignificant, having been between January, 1898, and September, 1899, about 3 per cent. of the total coal traffic at the station and siding combined, or an average of about 1,000 tons in each year. The station rate has been, therefore, little more than a paper rate, and although it would have saved much trouble if the railway company had fixed different rates for the station and the sidings, I think their explanation may be accepted, that, in view of the insignificance of the station coal traffic, they had not thought it worth while to make any distinction. At any rate, I cannot regard rates under which so wholly disproportionate an amount of traffic is carried as "comparable" rates for the purposes of this inquiry.

It is open, however, to the applicants to prove their claim by

⁽¹⁾ *Ante*, Vol. X. 194.

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other evidence than that of a comparable rate. They have failed in their claim to a $2\frac{1}{2}d.$ rebate on the proportional principle, but they say that, even assuming that the coal rates are made up of the maximum conveyance rate, and $2d.$ added for services at both ends (and I think that this was sufficiently proved), a rebate of $1d.$ should be allowed from the added $2d.$ The penny, they say, although this has not been admitted or, I think, proved, is charged for services at the Low Mill sidings, and regard being had to the decision in the previous case, this is said to be wrongly charged, and a corresponding rebate is claimed. It may be questioned whether a rebate from a rate that is above the maximum can be claimed under section 4 of the Act of 1894, but however this may be, I think it as well to say that, while giving full effect to our previous decision, and without quantifying the value of each service, I am satisfied by the evidence before us that $2d.$ cannot be more than the company are reasonably entitled to ask in return for what they do for the applicants' traffic, and that there is no ground for asking for any rebate from it. As regards the other points raised, I entirely agree with the views of my colleagues.

LORD STORMONTH DARLING: I agree with my colleagues in their conclusion on the question of rebate, because I do not think that the applicants have shown any just cause for granting one; and I say so mainly because the insignificant quantity of coal delivered at Penicuik station seems to me to deprive the rate to that station of all the importance which in ordinary circumstances would attach to it as a "comparable rate."

It is perhaps hardly necessary that I should notice two legal arguments which were advanced by the Dean of Faculty. But I should not like it to be thought that I had any doubt of the title of the applicants to apply for a rebate. It is true that the rate is charged by the company against the colliery owners in the first instance, but it is specifically included in their accounts against the applicants, out of whose pocket it comes. The colliery owners are thus the agents of the applicants in making the payments, and the latter are the only persons having any interest to complain of an overcharge, or to ask for a rebate.

Neither can I assent for a moment to the plea that this is not a siding falling within the purview of section 4 of the Act of 1894. That plea is, I think, founded on a misconception of what was decided in the case of *Watson, Todd & Co.* ⁽¹⁾. I can find nothing in the statute which gives the least countenance to the idea that it only applies to a siding the site of which is within a terminal station.

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The following was the order made :

“ This Court doth find and determine that the applicants are not entitled to a rebate or allowance off the rates charged to them by the railway company for the carriage of coal to the said Low Mill siding, in respect of the railway company not providing station accommodation for the applicants at Low Mill siding, and this Court doth therefore order that the said application be, and the same is hereby, dismissed.”

The applicants appealed against this order.

Ure, K.C., and *Clyde*, for Messrs. Cowan.

It has already been decided between the same parties that the services performed by the railway company at the siding are nothing beyond conveyance, which only ends when they put the trucks on to the siding ⁽²⁾. Where something more than the maximum rate is charged, and there are no terminal services in respect of which charges can be made, the extra amount must be set down to siding services, for which, as has been shown, the railway company are not entitled to charge. The Commissioners have exceeded their jurisdiction in determining that the railway company are entitled to charge for their services at the siding, for that question is one which is by statute relegated to the consideration of an arbitrator appointed by the Board of Trade, and the Commissioners had no jurisdiction to decide it. It is competent to examine the Commissioners' judgments to discover their grounds of decision, and if these are erroneous their order is open to review : *North-Eastern Railway Company v. North British Railway Company* ⁽³⁾.

⁽¹⁾ *Ante*, Vol. IX. 90.

⁽²⁾ *Ante*, Vol. X. 169.

⁽³⁾ *Ante*, Vol. X. 82.

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The Commissioners have decided that there is no case for a rebate, because the traders are in fact not so charged. That is quite a good *ratio decidendi*, and is an end of the question: *Salt Union, Limited v. North Staffordshire Railway Company* ⁽¹⁾. The Commissioners, however, have power to consider all questions affecting the application, and they have found that the railway company are performing services at the siding which are advantageous to the traders, and for which the traders ought to pay: *Corporation of Birmingham, &c. v. Midland Railway Company* ⁽²⁾.

LORD KINNEAR: We have heard a very able argument for the appellants; but it has not convinced me that the order of the Railway Commissioners is wrong. The application to the Commissioners is presented under section 4 of the Railway and Canal Traffic Act, 1894, by which it is provided that "whenever merchandise is received or delivered by a railway company at any siding not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee, in respect that the railway does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate." Founding upon this enactment, the applicants aver that they receive at their Low Mill siding, which belongs to them and not to the company, large quantities of coal for use in their works, that these coals come from Arncliffe, Whitehill, and other places on the respondents' line, and are received and unloaded by the applicants entirely on their Low Mill siding; that the applicants do not ask and do not receive any station accommodation for their coal traffic; that the respondents, however, charged them rates for coal which are of the same amount as they charge at Penicuik, a station at

⁽¹⁾ *Ante*, Vol. X. 179.

⁽²⁾ *Ante*, Vol. IX. 165.

22 chains' distance from the siding, to traders who receive station accommodation there; that these rates include a station terminal, and that the respondents refuse to make any rebate or allowance in respect thereof.

The complaint, therefore, is that the applicants have been charged for station accommodation in respect of the traffic to Low Mill siding; and since Low Mill siding is not a station, it follows that if any station charge is included in the rate, it ought to be disallowed. But if that be the ground of complaint, the onus of showing that the rates charged to them do in fact include charges for station accommodation lies, beyond question, upon the applicants. The strength of their case is that the rate charged to them at their siding is above the maximum conveyance rate, and that exactly the same excess in addition to the maximum is charged at Penicuik station, where station accommodation is provided. Now, when a railway company provide a station, it is reasonable to suppose that a charge for such accommodation is included in the rate; and when they charge exactly the same rate at a neighbouring siding, they furnish to the trader a plausible argument that they are trying to charge for station accommodation at the siding also. But that is a bare presumption which may be reargued; and a complaint upon that ground, therefore, raises in the first place a simple question of fact. The Commissioners have inquired into the facts; and they have decided, for very clear and convincing reasons, that upon the facts the appellants' case has failed. They have held that no useful comparison can be made between the Penicuik station rate and the rate in dispute, because while the rates are identical, the traffic at the station bears no reasonable proportion to the traffic at the siding, the former traffic having been about 3 per cent., and the applicants' traffic 97 per cent., of the whole coal traffic to Penicuik, and they hold that "rates under which so wholly disproportionate a traffic is carried," cannot be regarded as comparable rates for the purpose of the appellants' argument. But they have further found, as a result of the evidence before them, that the rates charged at Penicuik station were not taken as a model for the charge at the siding, but, on the contrary, that in readjusting

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their scale of charges after their Act of 1892, the company's officers first fixed the proper rate for coal traffic from siding to siding, because the great bulk of the traffic is so carried, and then adopted the rate so fixed for station traffic, because the amount of that traffic seemed to be too insignificant to make it worth their while to enter into a separate calculation. They arrived at the siding-to-siding rate by taking the conveyance rate at the maximum, which they were quite entitled to do, and adding 2*d.* per ton for cost of services at both sidings; and the Commissioners say that this is a low charge, which, were it not for its equalling the station charge, would scarcely have been disputed. Having fixed the siding rate in this way, they took the same rate for the traffic to the station, without distinguishing between the cost to them of station and siding traffic, because the station traffic was too small to justify a more minute and elaborate discrimination. In these circumstances, the Commissioners have held that the appellants' case has failed, because while the railway company are admittedly charging more than the conveyance rate, they are not charging for station accommodation which they do not provide, but they perform services at the siding which are costly to them and advantageous to the traders, and for which they ought to be paid. They, therefore, pronounced the Order under review, by which they find and determine that the applicants are not entitled to a rebate or allowance off the rates charged to them by the railway company for the carriage of coal to Low Mill siding.

In so far as it determines questions of fact, we have no power to review this decision; and were it not for a plea to jurisdiction, it would seem to me to involve no other question. The question whether a rate is reasonable or not, is just as much a question of fact as whether it is charged for one service or another, or whether services have been rendered. It is a question of which the Railway Commissioners are much better judges than we are. But at all events their judgment is final. The jurisdiction of the Commissioners, however, has been challenged by either party, and that, undoubtedly raises a question of law for the determination of this Court.

The point taken by the railway company was not, I think,

very seriously pressed, and is not probably material to their case, since according to them the Order is right whatever view be taken of their objection to the jurisdiction. But since it was stated, I think it right to advert to it, both that it may not be supposed to have been overlooked, and in order to define the limits of our present judgment. It is said that the moment the Commissioners have found that the rates charged do not in fact include station or terminal services, there is an end of the question, and a rebate must at once be disallowed, because a rebate to be allowed "in respect that a railway company does not provide station accommodation or perform terminal services," necessarily implies that such accommodation or such services have been charged for, and therefore when it turns out that they are not charged for, there is no longer any ground for complaint under the section. I do not think we are called upon to consider whether that is the true construction of the statute; or whether, on the other hand, the trader who has not received station accommodation or terminal services may not make good his claim for a rebate if he has been called upon to pay any charge which he ought not to be compelled to pay. That is a question on which different opinions have been expressed by judges of high authority, but all that it is necessary to decide for the present purpose is that the railway company may have a good answer to the application, if they can show that the charge complained of is not made for station accommodation, but for services which they render to the trader at his siding, and for which they ought to be paid; and that, on the other hand, if that be maintained, it must in all justice be equally open to the applicant to challenge the new ground of charge so brought forward in answer to his complaint, and to show reason, if he can, why it ought not to be taken into account. I think therefore that the Commissioners were perfectly right in examining the ground of charge alleged by the railway company, in order to determine whether anything had been done for the traders that could be set off against any claim for a rebate that might arise by reason of no station accommodation having been provided.

The appellants, on the other hand, maintain that the Railway Commissioners have exceeded their jurisdiction in determining

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that the company are entitled to charge for their services at the siding, because that is a question which has been committed by statute to the exclusive judgment of a different tribunal. This plea is founded on an Act of Parliament passed in 1892, to confirm a provisional order made by the Board of Trade under the Railway and Canal Traffic Act, 1888, the fifth section of which provides that the company may charge for certain services, including services rendered at or in connection with sidings not belonging to the company, when rendered to a trader at his request, or for his convenience, a reasonable sum by way of addition to the tonnage rate; and that any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. The point taken upon this enactment was stated in two ways. In the first place, it was said to be a condition precedent to the right of the company to make a charge for services at a siding, or to bring it under the consideration of the Commissioners, that they should first have obtained the determination of an arbitrator that such charge is reasonable. I think this view is untenable. The enactment is not that the company may charge a sum fixed by an arbitrator, but that they may charge a reasonable sum, and that if any dispute arises, not necessarily as to the reasonableness of the sum, but as to any point that can be raised under the section, it shall be determined by arbitration. The arbitrator is only to be called in when a dispute has arisen, and when occasion arises, he may be called in at the instance of either party.

The other form in which the objection was put was, that when the company brought forward their claim to charge for siding services, a difference arose which the Commissioners had no power to decide. If this were right, the proper course for the appellants to take was to move the Commissioners to sist the proceeding until the determination of an arbitrator should be obtained. It does not appear from the notes of procedure before us that any such motion was made. But whether the appellants failed to make the motion, or whether it was made and rejected, I am of opinion that the Commissioners were right in deciding the question for themselves, because they have power to determine

the whole questions before them, and had no need to call in the aid of any other jurisdiction. It is true that a jurisdiction to determine differences arising under the section in question is conferred upon an arbitrator and not upon the Commissioners, and that a difference as to the liability of a trader to pay the charge in dispute is one of those that might have so arisen. But while the general jurisdiction to determine such questions does not belong to the Commissioners, a special jurisdiction is conferred upon them by the Act of 1894, which is a later statute, to determine questions such as those raised by this application, and in particular to determine whether any, and if any what, reasonable allowance or rebate should be made in respect of the company not providing station accommodation. Now it is a familiar and elementary doctrine that when jurisdiction is conferred to determine specific rights, that necessarily implies jurisdiction to decide every question that must be decided in order to a final and effective determination of such rights. But it is manifest that the Commissioners could not determine the question submitted to them by the appellants without deciding whether the charge for services at the siding ought or ought not to be taken into account. It is impossible to decide what part of a charge it would be reasonable to take off, without deciding what part it would be reasonable to leave standing. The prayer of the petition to the Commissioners is to determine what are the reasonable or just rebates to be made from rates charged to the appellants, and I cannot imagine how this is to be done without ascertaining whether the rates charged are as they stand reasonable and just, or not. The Commissioners have therefore exercised exactly the jurisdiction which the appellants themselves have invoked, and I think that in this respect the application itself, and the determination of the Commissioners upon it, are founded upon a correct view of the statute. The Commissioners have not determined, and have not been asked to determine, a difference arising under the 5th section of the provisional order confirmed in 1892, and that is the only difference which must be referred to arbitration. They have decided a difference under the 4th section of the Act of 1894, and their authority to do so rests upon the express terms of that enactment. For these

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reasons, I am of opinion that the objection taken to the jurisdiction of the Commissioners is unfounded. No other ground has been suggested for holding that the Commissioners have fallen into error in law, and as to all questions of fact the decision is final. The appeal must therefore be dismissed.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

[Solicitors for the applicants: *Menzies, Black, and Menzies*, Edinburgh.]

Solicitor for the railway company: *James Watson*, Edinburgh.]

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LANCASHIRE AND YORKSHIRE RAILWAY COMPANY

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Rebate on Sidings Traffic—Sidings Agreement—Effect of Subsequent Legislation—Services at Trader's Siding—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 4—Railway Rates and Charges (No. 10) Order Confirmation Act, 1892, section 5 of the Schedule.

In 1891 a trading company entered into an agreement with a railway company for the construction of a siding. Clause 10 of the agreement was as follows:—"The railway company will make to the limited company an allowance of not less than 8d. per ton for loading and unloading wagons and sheeting the same, in respect of cotton and yarns and other goods usually handled by the company, received at or forwarded from the proposed sidings. And the railway company will not charge any terminal in respect of coal traffic from the same."

July 27,
November 1, 8,
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February 13,
1902.

Subsequently to the agreement the following Acts of Parliament were passed:—

1. The Railway Rates and Charges Order Confirmation Act, 1891 and 1892, by section 5 (sub-section 1) of the schedule to which railway companies are authorised to charge a reasonable sum, by way of addition to the tonnage rate, for services rendered to a trader at his request or for his convenience, at or in connection with sidings not belonging to the company.

2. The Railway and Canal Traffic Act, 1894, section 4 of which enacts:—"Whenever merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate."

Upon an application by the trading company for a rebate under the Railway and Canal Traffic Act, 1894, and a cross application by the railway company

(1) Before WRIGHT, J., and Commissioners Sir FREDERICK PEEL and Viscount COBHAM, sitting at the Royal Courts of Justice, London.

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for an allowance under the Railway Rates and Charges Order Confirmation Act, 1892.

Held, by the Court of Appeal (affirming the decision of the Railway Commissioners), that by the agreement the sidings in question were treated as a station, and the railway company were to charge as at a station less the special allowances.

Held, also, by the Court of Appeal (overruling the decision of the Railway Commissioners), that there was nothing in the subsequent legislation incompatible with the agreement, into which the parties had entered with the knowledge of impending legislation, and for perfectly good consideration, and by which they were bound.

THIS was an application under section 4 of the Railway and Canal Traffic Act, 1854, and a cross application under section 5 (sub-section 1) of the Railway Rates and Charges (No. 10) Order Confirmation Act, 1892.

It arose under an agreement dated 1891, and entered into between the applicants, who were cotton spinners at Shaw, near Oldham, on the one part, and the Lancashire and Yorkshire railway company on the other part. By this agreement the railway company were to lay down sidings and provide signals for the accommodation of the applicants, towards the maintenance of which the applicants were to pay the sum of 10*l.* yearly. The applicants were to provide for the signalling, unless their traffic exceeded 10,000 tons per annum. They were also to pay a yearly rent of one guinea for so much of the railway company's land as was occupied by the sidings. The railway company were to have the control of the sidings and the traffic thereon; and they were entitled, if the necessities of the railway so required, to remove the sidings; but, upon the applicants providing sufficient land, the railway company were bound to lay down equally convenient sidings thereon in substitution. The agreement thus gave a permanent right of user to the applicants.

Clause 10 of this agreement was to the following effect:—
“The railway company will make to the limited company an allowance of not less than 3*d.* per ton for loading and unloading wagons and sheeting the same, in respect of cotton and yarns and other goods usually handled by the company, received at or forwarded from the proposed sidings. And the company will not charge any terminal in respect of coal traffic to or from the same.”

The applicants stated in their "application" that they were connected with the respondents' railway by a siding not belonging to the railway company, and they complained that the rates charged on traffic to and from their siding were of the same amount as those in force to Shaw station, which adjoined their siding, and included charges for collection or delivery, for station accommodation and for terminal services at Shaw station, although none of these services were rendered to the applicants.

They admitted that the railway company had allowed them a rebate of 3*d.*, but contended that the amount beyond that sum which was included in the rate charged to them in respect of collection or delivery, and for station and service terminals at the Shaw end of the journey, constituted an illegal overcharge.

They asked for an order determining what was a reasonable and just allowance or rebate to be made from the said rates charged to them in respect of traffic passing to or from their private siding.

The railway company denied that the rates charged the applicants included charges for collection or delivery or for station accommodation or for terminal services at Shaw station; but they admitted that the rates charged were of the same amount, less the rebate allowed under the agreement, as those in force from or to Shaw station when traffic was not collected or delivered at Shaw station, and contended that the services rendered and accommodation provided by the respondents at or in connection with the applicants' siding justified this equality of charge.

Balfour Browne, Q.C., and Ernest Moon, for the applicants.

The words in clause 10 of the agreement "not less than 3*d.*" do not prevent a rebate of more than 3*d.* By the agreement the trader was to pay what the railway company were entitled to charge, and no more; and if the railway company are not entitled to charge for terminals, there is no provision in the agreement saying the trader shall pay for terminals.

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for the railway company.

By the agreement the trader was to pay the same as at Shaw station.

WRIGHT, J.: We all think that this agreement can have but one business meaning, and I think I express the views of the other members of the Court when I say that the only business meaning of it is that Messrs. Crompton are to pay on the footing of the siding being treated as a station, subject to the deduction of at least 3*d.* for the loading and unloading and so forth, and of all station charges, I suppose it would be, in respect of coal. What the effect of the agreement being so construed may be I do not know; we have not heard the learned counsel, but that is what the agreement appears to us to mean. We do not think that Messrs. Crompton can claim as a right to be allowed more than 3*d.* for those matters that are covered by the minimum of 3*d.*

The railway company had meanwhile applied to the Board of Trade to appoint an arbitrator to determine, as a difference arising under section 5 (sub-section 1) of the schedule to the Railway Rates and Charges (Lancashire and Yorkshire Railway) Order Confirmation Act, 1892, the reasonable sum which might be charged in addition to the tonnage rate in respect of services rendered at the traders' siding.

The Board of Trade referred the question to the Railway and Canal Commissioners.

Cripps, Q.C. (C. A. Russell, Q.C., and Noble with him), for the railway company.

As a general proposition, a private agreement between the parties is not affected by legislation, unless that legislation makes something in the agreement illegal. The traders cannot be entitled to any benefit given them by the agreement and also to say, "You cannot make us any charge, which, if there was no agreement, you could not make."

Balfour Browne, Q.C., and Ernest Moon appeared for Messrs. Crompton & Co.

The judgment of the Court was delivered by Mr. Justice Wright.

WRIGHT, J. : The agreement on which the railway company rely is dated the 2nd July, 1891. It provides in effect, so far as material, as follows : By clauses 1, 3, and 7, the railway company are to provide certain sidings with signals for Messrs. Crompton's traffic near Shaw Station, and Messrs. Crompton are to pay 10*l.* a year towards maintenance, and a guinea a year for rent of the land, and are to fence the sidings. Secondly, the cost of working the signals is to be borne by Messrs. Crompton, unless their traffic exceeds 10,000 tons per annum, but in that case by the plaintiff company. Articles 4 to 6 inclusive define the purposes for which the sidings are to be used, and by articles 8 and 9 the control of the traffic over the sidings is reserved to the railway company. Under article 10 the railway company are to make an allowance of not less than 3*d.* per ton in consideration of being relieved of the handling and sheeting of Messrs. Crompton's goods, and are to charge them no terminal for coal. By article 11 the railway company may alter or remove the sidings for the convenience of their own railway, but must, if required, substitute other sidings on land to be provided by Messrs. Crompton. The effect of this provision seems to be to make the agreement perpetual at the option of Messrs. Crompton.

At the former hearing we were asked to determine the effect of the agreement by itself, and we reserved the question of the effect of the agreement as considered in relation to subsequent legislation. We thought that the effect of the agreement by itself at the time when it was made was that the charges which the railway company were then able to make for the traffic as it was worked before the making of the agreement should be modified merely by the allowance in respect of handling and sheeting, and the renunciation of the terminal on coal. And as at that time the charges made were no doubt within the maximum which the railway company had power to charge on traffic to or from the sidings, it was practically impossible for Messrs. Crompton to enforce any reduction. But since the date

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of the agreement the charging powers of the railway company have been fundamentally altered, and it is conceded that unless the agreement excludes or overrides the subsequent Traffic Acts and Provisional Order Messrs. Crompton are entitled to some relief, particularly in relation to the charge for a station terminal.

It is not in this case necessary to determine what consequences would have followed if the agreement had expressly or by necessary implication provided that the rates and charges on traffic to and from the sidings should be at all times the same as the rates and charges to and from the Shaw station, or should never be reduced below their then amount. In this agreement there is no such express provision nor any ground for necessary implication to that effect, and although the agreement may have had a particular effect when it was made, and has a different effect now, we cannot supply a remedy. We have no right to insert into the agreement a provision which the parties have omitted to make.

The possibility of hardship to a railway company in a case of this kind is obvious. They may have consented to construct sidings in the belief that they could protect themselves from loss, and they may now find that they have improvidently allowed the diversion from their station of traffic, which it was constructed for and is sufficient to accommodate, and which might have there produced more profit than they can derive under the Traffic Acts and Provisional Orders from the traffic as diverted to the sidings. They might have protected themselves by taking power to terminate the agreement, and possibly in some cases railway companies have protected themselves in that way. But that would not be a satisfactory remedy. It might be desirable that power should be given to this Court to revise agreements of this kind, but it has no such power at present.

The railway company appealed.

C. A. Russell, K.C., and *Noble*, for the railway company.

The agreement entered into refers to Shaw station rates, not as a fixed amount, but as by law they might from time to time

be, and the new legislation affects the Shaw station rates. The argument that the parties are set free from the agreement is a possible one; but not that which stands by the agreement as still operating, and yet claims to be at liberty to deal with the question of charges under the Act of Parliament, as if no bargain had been made at all. The rebate granted (of 3*d.*) cannot be altered by the intervention of the tribunal.

Balfour Browne, K.C., and Ernest Moon, for Messrs. Crompton & Co.

There is nothing in the agreement binding the trader to pay the Shaw station rate. The rebate there granted is from the rate the company is legally entitled to charge. Parliament has prohibited the railway company from charging a station terminal, and there is no bargaining out of this in the agreement. The Railway Commissioners should determine what rebate, in addition to the 3*d.* granted, represents the service terminal. The railway company admit it should be 5*d.*

COLLINS, M.R.: This is an appeal from the decision of the Railway Commissioners granting an application made by Messrs. Crompton & Co. in this matter, who asked for "an order determining what is a reasonable and just allowance or rebate to be made from the said rates charged to the applicants in respect of traffic passing to and from their private siding."

Now the question arises in this way: The applicants are merchants and manufacturers carrying on business at a point near the line of the respondent railway company who are the appellants here. They had been up to the date of an agreement to which I will refer in a moment, receiving and delivering their goods at a station called Shaw station, something like half a mile away from their works. In July, 1891, the parties came together and made an agreement whereby it was provided that a siding should be constructed by the railway company, principally, if not altogether, on land of the railway company for the accommodation of Messrs. Crompton, and certain provisions were made as to the sum to be paid by Messrs. Crompton for the use of the siding. Practically Messrs. Crompton acquired

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the right to use this siding for ever on paying a certain rent agreed upon. They also provided by the same agreement for the rates and allowances to be made in respect of the goods, received for and sent forward by Messrs. Crompton, being delivered at the new siding, when made, instead of at the station at which they had been previously received and delivered. It is quite obvious, of course, that the substitution of the siding for a station would make certain differences in the obligations of both parties; that the railway company would find a benefit in that its existing accommodation at its station would be relieved from overcrowding to the extent that the overcrowding, if any, was caused by the traffic of the applicants, and on the other hand, they would lose the profit they would have made in rendering the services which they had rendered to the applicants for the traffic delivered to and sent from the station. Therefore both parties had to come together and agree upon this: what the railway company on the one hand should be entitled to demand from the trader, assuming he were not in a condition to dispense with some of their services, and what on the other hand ought to be the allowance which the railway company ought to make to him in view of the fact that under the new arrangement certain services that otherwise would have to be performed by the railway company would be performed by him and not by them. That was practically the question they had to determine. At the time they were discussing this matter, everybody connected with the railway world—including both those sending their traffic over the railway and the railway company that had to deal with it—was aware that the whole subject of the rates chargeable by the railway companies to customers was under discussion by the Legislature, that the results had been formulated in the shape of Provisional Orders in two other instances before the date of this agreement, and that the object and result of the legislation was to divide up the rates chargeable by railway companies, to break them up into their constituent parts, and to lay down certain axioms applicable to each of those parts principally in relation to the services that were formerly rendered by the railway company as carriers. It was in view of that legislation, and pending

difficulties in readjusting rates thereunder—with the full view of that class of legislation impending and accomplished, for it turns out I think that all the Provisional Orders made from time to time under it for all the railways are in the same form—it was, I say, in that state of circumstances that these parties came to agree, and agree, as it seems to me, in order to get rid of impending difficulties under the new legislation. What did they do? Having provided by the agreement where the traffic was to be put, and so on, they come to clause 10, which is this: “The railway company will make to the limited company an allowance of not less than 3*d.* per ton for loading and unloading wagons and sheeting the same, in respect of cotton and yarns and other goods usually handled by the company, received at or forwarded from the proposed sidings, and the company will not charge any terminal in respect of coal traffic to or from the same.” It is said that nowhere on the face of this agreement is there anything about the charges to be made to the railway company, but that the railway company’s part of the matter begins with a provision for an allowance. That is perfectly true, but then that is explained thus—that it was understood by both parties that a sum was to be charged by the railway company, off which under clause 10 an allowance or rebate was to be made. How did they arrive at this? What was the standard by which they were trying to arrive at it? Obviously it seems to me the standard was this: we are going to turn what was a station into a siding; your station was at Shaw; this station is going to be put some half mile away from it. For all practical purposes I think in dealing with this matter it makes no difference whether the station so far as the station yard was concerned was actually at Shaw or half a mile away from it; but what they had to consider, and the method obviously of business which they adopted in assessing their right was this: what would be the railway company’s rights with respect to the trader, supposing they had to deliver at a station or deliver where they were going to substitute a siding for a station, and what rebate off that sum ought the trader to have in view of the facts I have referred to, the difference in the nature of the work, the amount of accommodation, and the work to be done by the railway company on

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the one hand and the trader on the other. So they began by ascertaining what would be the proper charge, and they took off that charge so much as they agreed upon as a fair equivalent, to meet the respective rights and obligations brought about by the new state of things. I think they intended as business men to come to an agreement which would get rid of all further difficulty and discussion. Now, the parties having arrived at that agreement in 1891 this application is made in this year, and it is said that the trader by reason of recent legislation is entitled to come and ask for a rebate from the ordinary station charges by reason of the fact that he has got a private siding. He bases his application upon section 4 of the Railway and Canal Traffic Act, 1894, which is in these terms: "Whenever merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway company does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute and to determine what, if any, is a reasonable and just allowance or rebate." It is said here that by the legislation of the Provisional Order governing the Lancashire and Yorkshire Railway, published in 1892, the railway company are not now entitled to make a station charge except at a terminal station, and when the siding has been substituted for the station that wipes out by itself and by law the right to make a charge for a station terminal. The answer to that set up by the railway company is this agreement, and the question is whether this agreement did conclude the matter as to this suggested subject of discussion as well as the others in its terms. It seems to me that it did. It seems to me that the agreement must be viewed in reference to the fact that they were substituting the siding for the station, and that under the circumstances there was contemplated, in the undertaking respectively of the parties and the rights adjusted between the parties, the fact that something that was not technically station accommodation

would be substituted in the future for something that was technically station accommodation before, and that they swept into this discussion, and covered and allowed for them in the discussion, all those elements which, if we were bound to proceed technically under the Provisional Order, would come in to be considered on the one side and the other. Certain deductions have to be made where the station is not a terminal station. On the other hand, there are certain services rendered with reference to a siding different to and in excess of what would be rendered at a station, such as special signalling, special haulage, special marshalling; all those matters come in under the 5th section of the Provisional Order. There was one other point which gave rise to some discussion also. That was this: Mr. Balfour Browne pointed out that by far the larger portion of the siding which he now uses has been added since the agreement, and was altogether upon his own land. Now does that make any difference in this discussion? It seems to me it does not. The bargain was, as I have said, that on the siding made under the agreement in lieu of the station the railway company were to deliver, and from that siding they were to receive, the traffic off the applicant's land. It does not matter that the applicant has on his own land enlarged the area upon which he can place the trucks after he has got these things from the siding. The siding made under the agreement intervenes between the new siding and the railway line, and everything he receives and sends out of the siding must pass over the railway line. For this purpose it is the agreement siding that is substituted as the station for the old station. All the extra services that have to be done by the railway company in view of its being a siding are done at the agreement siding, and it is at the agreement siding that all these things—the marshalling, the signalling, the hauling—are done, just the same whether there is a mile of his own sidings or an inch.

The case seems to have divided itself into two parts before the Railway Commissioners, and there was the preliminary judgment given by Mr. Justice Wright. In that judgment he distinctly held, as it seems to me, with the concurrence of the Commissioners themselves, this, “that the only business meaning of it is that Messrs. Crompton are to pay on the footing of the

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siding being treated as a station subject to the deduction of at least 3d. for the loading and unloading and so forth, and of all station charges, I suppose it would be, in respect of coal." It seems to me to be a decision of the learned judge, a decision which I am entitled to rely upon, and one which gives me this gratification, that in differing from him and his colleagues, as I and my learned Brothers do in this case, I am not really differing from his views of the law on the matter, because he distinctly lays down what his view of the agreement was before he considers the effect of the future legislation upon it. In the second judgment the point was, how far the subsequent legislation altered what he laid down as to the true interpretation of this agreement. On that point I come to the conclusion that the subsequent legislation does not alter it because the parties agreed, for a perfectly good consideration, to make their own bargain and not take the bargain made for them by the Railway Commissioners. Unless there is something in the subsequent legislation incompatible with it, that must stand. It seems to me there is nothing incompatible with the agreement in the subsequent legislation. The agreement regulates the rights of the parties, and we ought not to look to the Provisional Order to determine them. It therefore seems to me that the appeal ought to be allowed.

ROMER, L.J. : I am of the same opinion as the Master of the Rolls. I agree with the first judgment of Mr. Justice Wright and not with the second judgment. It appears to me that dealing with this agreement of the 2nd July, 1891, as a business agreement made under the circumstances to which the Master of the Rolls has called attention, it is impossible to avoid coming to the conclusion, having regard to clause 10, that it was an implied term of this agreement that the railway company should be paid by the limited company all such charges as the railway company were properly entitled from time to time to charge on the footing that the siding provided under the agreement was treated as a station, so that the railway company would be entitled to include in the charge against the limited company a charge for all such services as are generally performed by the

railway company at its stations, subject only to the special allowances provided for by clause 10 ; the one being the allowance of "not less than 3*d.*," whatever that expression may mean, for loading and unloading wagons and sheeting ; and the other being the provision that the railway company are not to charge any terminal in respect of coal traffic to and from the siding. That being so, that ends the question on this appeal, for nothing that has taken place subsequently has affected the question for us. In the first place the Provisional Order has, in substance, stated the maximum charge which the railway company may make for traffic to or from the station. It is not alleged that on the footing of this siding being treated as a station, the railway company are making any charges beyond those that they are entitled to. Then, with regard to the Act of 1894, section 4, when that section is looked at it is very clear that it has no application to a case like the present, where there is an agreement such as I have indicated for a payment to the railway company on the footing of this siding being treated as a station in the manner I have mentioned. I think, therefore, the appeal should succeed.

MATHEW, L.J. : I am of the same opinion. I agree with the preliminary judgment pronounced by Mr. Justice Wright in this case. I think that the station, for the purposes of the agreement, was the end of the siding provided by the company. What was the intent of this agreement ? It seems to me clear it was only meant that the station charges should be modified in the particulars mentioned in the agreement for the loading and unloading, *et cetera*, and for the abandonment of the claim to a coal terminal. Now was that agreement meant to be conclusive ? It seems to me, as a matter of business, it certainly was. It was made at a time when the alterations might be expected, and the agreement is, in my opinion, binding on the parties. I therefore agree this appeal must be allowed.

[Solicitors for the applicants : *Sharpe, Parker, Pritchards & Co.*, agents for *Standring, Taylor & Co.*, Rochdale.

Solicitors for the railway company : *Woodcock, Ryland, and Parker*, agents for *C. Moorhouse*, Manchester.]

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1. *Right to Communicate with Sidings of Railway Company—Specific Appropriation by Railway Company as Refuge Sidings.*—Section 76 of the Railways Clauses Consolidation Act, 1845, after giving power to owners or occupiers of land adjoining the railway to make private branch railways to communicate with the railway, enacts that—"The company shall, if required, at the expense of such owners and occupiers and other persons . . . make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication, in places where the communication can be made with safety to the public, and without injury to the railway and without inconvenience to the traffic thereon; . . . but this enactment shall be subject to the following restrictions and conditions (that is to say), . . . The company shall not be bound to make any such openings in any place which they shall have set apart for any specific purpose with which such communication would interfere, nor upon any inclined plane or bridge, nor in any tunnel."

The applicant's sidings had communicated with sidings on the respondents' railway for many years under a terminable agreement, which the railway company terminated; and he now applied under the above-quoted section for an order enjoining the respondents to make, or permit to be made, such lines of rails as might be necessary for effecting a communication between the sidings of the applicant and of the respondents. The railway company refused to make such communication on the ground that their sidings were now set apart for a specific purpose, with which such communication would interfere. At the hearing of the case witnesses on behalf of the railway company proved that the alteration in the contemplated use of the siding was due to an alteration recently made in an adjoining tunnel. This had fallen in, and it had been found necessary to have only a single line of railway for a portion of its length. The consequent alteration in the working of traffic through the tunnel necessitated the exclusive appropriation of the sidings over which the applicant's traffic had formerly been worked to the purpose of providing refuge sidings for trains which met at the tunnel.

Held, that the railway company had shown to the satisfaction of the Court that their sidings had been *bonâ fide* appropriated for the specific purpose of use as refuge sidings, and that the use of them for the applicant's traffic would interfere with such use.

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2. *Adjoining Owner—Openings for Communication with Railway—Obligation to Make—Jurisdiction of Railway Commissioners.*—Section 76

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of the Railways Clauses Consolidation Act, 1845, gives power to owners or occupiers of lands adjoining the railway to lay down "any collateral branches of railway to communicate with the railway, for the purpose of bringing carriages to or from or upon the railway," and further enacts that "the company shall, if required, at the expense of such owners and occupiers . . . make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication, in places where the communication can be made with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon." The enactment is subject to certain restrictions, one of which is that the railway company shall not be bound to make any such openings upon an "inclined plane."

Held, by the Railway Commissioners, that siding owners have, by this section, an absolute right to call upon railway companies to make necessary openings in their rails for effecting communication between sidings and the line of railway, unless one of the statutory objections mentioned in the section apply, and, therefore, the refusal of a railway company to make such connection, except upon the terms of a special agreement to be entered into on the part of the siding owner, is a contravention of the section.

Held, also, by the Railway Commissioners, that a siding having a gradient of 1 in 96 or 98 is not upon an "inclined plane" within the meaning of the section, which means a plane so inclined as to be incompatible with the reasonable insertion of a junction.

Semble, by the Railway Commissioners, that the words in the section "with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon," refer to difficulties depending on engineering considerations which can be proved to exist at the time of making the connection, and not to difficulties which may become existent by reason of the volume of traffic afterwards.

Held, by the Court of Appeal (reversing the decision of the Railway Commissioners), that the right given by section 76 of the Railways Clauses Consolidation Act, 1845, to the owner or occupier of land adjoining a railway to lay down collateral branches of railway and to require the railway company to make openings in their rails, and such additional lines of rails as may be necessary for effecting communication, is not an absolute right, but only a right to require a connection to be made for the purpose of the use of the railway by the adjoining owner with his own engines and carriages, and, therefore, that an adjoining owner who makes a siding is not entitled to demand communication with the railway for the purpose of establishing a claim to facilities for his traffic.

Held, also, by the Court of Appeal, that the words "with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon," do not relate solely to the structural difficulties of making an opening, but refer also to difficulties arising from working the traffic on the railway. *Lancashire Brick and Terra Cotta Co. (Baxenden), Limited v. Lancashire and Yorkshire Ry. Co.* 138

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FACILITIES, DUE AND REASONABLE, FOR TRAFFIC.

1. *Through Rates—Competing Routes—Diversion of Traffic—Transshipment of Goods—Rebates out of Through Rates.*—Certain through rates for traffic passing *viâ* Strabane, between the railway of the Great Northern company and the railway of the Donegal company west of Strabane, were in operation under a notice duly served on the Donegal company in accordance with the provision of section 25 of the Railway and Canal Traffic Act, 1888. Each of the railway companies owned a railway between Strabane and Londonderry, and were competing for the traffic.

Upon a complaint by the Great Northern company—(1) of the unreasonable delay caused by the Donegal company to traffic forwarded from Londonderry *viâ* Strabane, partly on the line of the Great Northern company and partly on the line of the Donegal company, and *vice versâ*; (2) of improper diversion of traffic from the line of the Great Northern company to the line of the Donegal company, and obstruction offered at stations on the Donegal company's line west of Strabane to the use by the public of the route to Derry by the line of the Great Northern company as a through route; (3) of improper refusal of the Donegal company to recognise the through bookings of passengers by the Great Northern company from Londonderry *viâ* Strabane to stations on the Donegal company's line west of Strabane; (4) of detention of the Great Northern company's wagons at Strabane owing to the delays in transshipment of traffic by the Donegal company.

Held, that the Great Northern company were entitled on the facts proved to an order enjoining the Donegal company to afford all due and reasonable facilities for carrying out the through system of booking and rates over the Great Northern company's and Donegal company's railways for passengers and goods as required by the notice served by the Great Northern company on the Donegal company, and in particular for transferring to and from the Great Northern company's railway all goods and traffic carried at through rates partly over the railway of the Donegal company and partly over the railway of the Great Northern company.

The Donegal company applied for an order declaring that the through rates in force under the notice served on the Donegal company by the Great Northern company were not a reasonable facility or required in the interests of the public, and that the same should no longer be in force.

Held, that no case had been made for rescinding the through rates.

Query, whether the Court has power to rescind through rates, which have become valid by a notice under section 25 of the Railway and Canal Traffic Act, 1888.

Upon complaint that the Great Northern company granted a rebate of 1s. per ton out of their portion of the through rates it was proved that the Great Northern company were not acting

FACILITIES, &c.—*continued.*

malu fide nor for the purpose of treating the Donegal company unfairly, but to secure a portion of the competitive traffic, and that without such rebate the Great Northern company would lose the traffic altogether owing to the delays caused by the Donegal company at Strabane.

Held, that no case had been made for prohibiting the Great Northern company from allowing the rebate. *Great Northern Ry. Co. (Ireland) v. Donegal Ry. Co.* . . . 47

2. *Refusing to Deliver at Private Siding—Undue Preference—Jurisdiction.*—Section 2 of the Railway and Canal Traffic Act, 1854, enacts—“Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively. . . .”

By section 1 the word “railway” includes every station used for the purposes of public traffic.

A railway company which had for twenty-eight years received and delivered coal and goods at a private siding belonging to a firm of traders informed the latter that, while they were willing to receive and deliver other goods as before, they would no longer deliver coal at the private siding.

In an application by the traders, the Commissioners found—

(1) That the delivery of coal at the siding was a due and reasonable facility which the railway company were bound to afford, and made an order upon them accordingly; and

(2) That by delivering coal at the private sidings of competitive traders and refusing to deliver it at the applicants’ siding the railway company were giving an undue preference to the former, and ordered them to desist from so doing.

On an appeal by the railway company:—

Held (1) (by a majority of seven judges of the Court of Session, consisting of the LORD PRESIDENT, the LORD JUSTICE-CLERK, LORD ADAM, LORD KINNEAR, and LORD TRAYNER—*dis. LORD YOUNG and LORD MONCREIFF*) that the Court of the Railway and Canal Commission had no jurisdiction to order a railway company to deliver traffic at a private siding, such sidings not being part of the “railway” within the meaning of section 2 of the Railway and Canal Traffic Act, 1854, and that the right of the railway company to refuse to deliver traffic at such sidings was not affected by the fact that they had in the past voluntarily received and delivered traffic at the siding in question, or that they were still voluntarily receiving and delivering traffic there in the case of goods other than the particular kind of goods which they had refused to deliver; and (2) (by the Second Division of the Court of Session) that the Court of the Railway and Canal Commission had jurisdiction to make the second order appealed against. *Cowan and Sons v. North British Ry. Co. (No. 2).* . . . 96

GROUP RATE. See *Undue Preference*, 2.

INCREASE OF RATES.

1. *Justification of Increase—Measure of Reasonableness—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1.*—In justifying an increase of rates under section 1 of the Railway and Canal Traffic Act, 1894, it is not sufficient to show an increase in the ratio of cost to receipts to an extent equalling or exceeding that

INCREASE OF RATES—*continued*.

of the advance in the rates. If it be shown, after all elements of cost and economy have been taken into consideration, that the necessary cost per ton carried will, under uniform conditions, be increased by any sum without any compensating circumstances, then it is *prima facie* reasonable to increase the charge by the same sum.

In considering under this section whether an increase of rate is reasonable, the Court is not precluded from having regard to any circumstances which may tend either to justify the increase or to prove it unreasonable.

Although the rates, as existing before 1893, are presumed by the Railway and Canal Traffic Act, 1894, to be sufficiently high, an advance shown to be necessary to accommodate them to circumstances may be allowed, even though the circumstances are of a date prior to 1893 (*e.g.*, circumstances existing since 1888), provided that the date is not too remote.

Upon a complaint by Manchester oil refiners under section 1 of the Railway and Canal Traffic Act, 1894, that the London and North-Western and other railway companies had, in March, 1893, directly and unreasonably increased certain rates per ton in force on December 31st, 1892, to the extent of some 5 per cent. :—

Held, that the railway companies having shown that the cost of goods traffic had grown proportionately between 1888 and 1892, an advance of rates in 1893 to the extent of 3 per cent. was justified, on the assumption that the rates in force down to the end of 1892 ought to be considered to have been not more than reasonable in 1888. *Smith and Forrest v. London and North-Western Ry. Co., Great Western Ry. Co., Midland Ry. Co., and others* 156

2. *Increase of Coal Rates — Justification of Increase — Comparative Tables—Discovery of Documents—Documents to show Extent and Profits of Applicants' Business—Damages.*—Section 1, subsection 1, of the Railway and Canal Traffic Act, 1894, enacts that—"where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an Act of Parliament or by any Provisional Order confirmed by Act of Parliament."

Upon a complaint, under the above section, by colliery owners that the respondent railway companies had, in December, 1899, increased the rates for the carriage of coal to an extent varying from the sum of 1*d.* per ton on rates not exceeding 2*s.* per ton, to the sum of 3*d.* per ton on rates exceeding 5*s.* per ton, and that such increase was unreasonable, the railway companies alleged that the increase was reasonable on the ground that the cost of working their coal traffic had increased owing to shortening of hours of labour, increase of price of fuel, additional capital expenditure, and other causes.

Held, that the evidence given by the railway companies as to the cost of working did not prove that when the coal rates were raised at the end of 1899 the cost of carrying that traffic showed such an advance upon the cost in previous years as to require or justify the raising of the rates.

INCREASE OF RATES—continued.

To justify a permanent increase of rate, changes affecting only temporarily cost of working (such as high price of locomotive coal) are not sufficient.

The Commissioners ordered an inquiry to be taken before the Registrar as to the damages sustained by the applicants in consequence of their having been compelled to pay these increased rates since January 1st, 1900, and held, that on such inquiry it would be open to the railway company to show, by any competent evidence, that damages had not been sustained by the applicants, and in particular that the increased rates had been, in whole or in part, truly borne by other persons.

Held, by the Court of Session (affirming LORD STORMONT DARLING) that the railway companies were not entitled to discovery of the business books and accounts of the applicants in order that extracts might be taken therefrom to show the amount of coal sold by the applicants, the cost of working it and the profits made. *Black and Sons v. Caledonian Ry. Co., North British Ry. Co., and Glasgow and South-Western Ry. Co.* . 176

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MAILS, CONVEYANCE OF.

Measure of Remuneration to the Railway Company—Special Trains—Trains timed by the Postmaster-General.—Under the Railways (Conveyance of Mails) Act, 1838, the Postmaster-General may by notice in writing require any railway company to convey mails by ordinary or special trains at such hours as he shall direct, and a railway company required by the Postmaster-General to so convey mails, shall be entitled to such reasonable remuneration as shall be fixed and agreed upon between the Postmaster-General and such railway company, or in case of difference between them as shall be determined by arbitration. The Conveyance of Mails Act, 1893, enacts that where under any Act relating to the conveyance of mails it is provided that any matter of difference relating to any remuneration to be paid by the Postmaster-General to any railway company, shall be referred to arbitration, that matter of difference shall at the instance of any party thereto be referred to the Railway Commissioners instead of to arbitration.

Upon an application to determine the amount of the remuneration to be paid per annum by the Postmaster-General to the Waterford railway company for the conveyance of mails on their railway—

(1) By certain special or notice trains required to be run by notice from the Postmaster-General;

(2) By certain ordinary or agreed trains timed by agreement with the Postmaster-General;

Held, that the remuneration for carrying the mails ought not to include any sum directly representing the capital cost of providing the railway; and, further, that the definite sum to be paid should be of sufficient amount:—

(1) To give the railway companies payment for the mails at their ordinary parcels rate less a rebate of one-third of it, in consideration of the usual terminal services in connection with

MAILS, CONVEYANCE OF—*continued.*

parcels being done in the case of the mail parcels by the Postmaster-General;

(2) To make up to them, when required, the gross receipts of the notice trains to 5s. per train mile;

(3) To compensate them for possible decrease of the receipts of agreed trains due to their times of running being partly fixed to meet postal requirements, the allowance under this head to be a "substantial" one (*per* MR. JUSTICE WRIGHT) and (*per* SIR F. PEEL) equal to a guarantee of 3s. 6d. gross receipts per train mile—the cost of working either class of train being taken by agreement at 2s. 7d. per train mile.

Held, also, that these conditions would be provided for by fixing the amount to be paid per annum at 8,000*l.* *The Waterford, Limerick and Western Ry. Co. v. The Postmaster-General.*

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PROPOSED RATE, WHETHER UNDUE PREFERENCE.

Proposed Reduction of Particular Rate—Whether Undue Preference or Justified by a Competitive Route—Benefit of Geographical Position—Jurisdiction—Application under Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 29, subs. 3.—Subsection 3 of section 29 of the Railway and Canal Traffic Act, 1888, enacts: "Where any group rate exists or is proposed, and in any case where there is a doubt whether any rates charged or proposed to be charged by a railway company may not be a contravention of section 2 of the Railway and Canal Traffic Act, 1854, and any Acts amending the same, the railway company may, upon giving notice in the prescribed manner, apply to the Commissioners, and the Commissioners may, after hearing the parties interested and any of the authorities mentioned in section 7 of this Act, determine whether such group rate or any rate charged or proposed to be charged as aforesaid does or does not create an undue preference."

The Merthyr Vale colliery was equidistant from the main line of the Taff Vale railway company (the applicants) and that of the Rhymney railway company, and was connected with each line by private sidings. The route from the colliery to Cardiff by the Taff Vale was shorter by 18 chains than that by the Rhymney. The Taff Vale charged a uniform mileage rate of '575*d.* per ton over their system, while the Rhymney charged a similar rate of '551*d.*, with the result that the total rate from the colliery to Cardiff was ½*d.* per ton more by the Taff Vale route than by the Rhymney route, although the distance was shorter. By section 24 of the Taff Vale Railway Act, 1879, section 90 of the Railway Clauses Consolidation Act, 1845, was incorporated, subject to the proviso "that the company (*i.e.*, the applicants) shall not, in the exercise of the powers conferred by this section, give any undue advantages to traffic passing from or to any of the valleys traversed by the company's present system of railways over traffic of the like description passing from or to any other of such valleys under the same circumstances."

PROPOSED RATE, &c.—*continued.*

Upon an application of the Taff Vale railway company, under the first quoted section, with a proposal to reduce their rates from Merthyr Vale colliery to Cardiff to the same sum as charged by the Rhymney railway company, on the ground that while the geographical position of the colliery entitled the colliery owners to a competitive service by the two routes, and the applicants to a share of the traffic, the other collieries on the applicants' line would not be thereby affected in any way:

Held, that there was not sufficient evidence to break in upon the uniform mileage system established over the applicants' and neighbouring railways, taking into consideration section 24 of the Taff Vale Company's Act, 1879, as well as the Railway and Canal Traffic Acts.

Quere, whether any public advantage would be served by the proposed lowering of rate, as the coal would come to Cardiff in any event; and, *quere*, what public interest would be served by a particular colliery having an improved train service.

Held, further, that in the exercise of jurisdiction under subsection 3 of section 29 of the Railway and Canal Traffic Act, 1888, no order should be made unless the Commissioners are of opinion that all the interests are before the Court, and then only on the fullest possible evidence. *In re Taff Vale Ry. Co.* 89

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REBATE ON SIDINGS RATE.

1. *Sidings "not belonging to the Company."*—Section 4 of the Railway and Canal Traffic Act, 1894, enacts that: "Whenever merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate."

A siding was constructed by a railway company upon a plot of land adjacent to their railway, leased to them by a trader for a term of 996 years at the yearly rent of 1*d.* The trader himself was a lessee of the plot of land at a yearly rental of 7*l.* odd. The sub-lease contained covenants that the railway company would erect a warehouse and construct a siding upon the plot demised, with proper connections connecting their main line with the warehouse; keep the siding and warehouse in repair; haul from the neighbouring station (a distance of three-quarters of a mile) into the siding, free of charge, wagons consigned to the owners or occupiers of the said trader's mills; take away at their own expense all covering used for such traffic and check the goods; and afford to the owners or occupiers of the mills free use and enjoyment of the warehouse; provided that, if they (the owners or occupiers) did not require the use of the whole warehouse,

REBATE ON SIDINGS RATE—*continued.*

the railway company were to be entitled to use such parts as might not be from time to time required. The owners or occupiers of the mills were to move the wagons from the point on the siding where left by the railway company to the warehouse, and also to load and unload, and perform all necessary labour, at their own cost and risk.

Held, by the Court of Appeal (affirming the judgment of the Railway Commissioners), that the siding was a siding "belonging to the railway company," not only in the sense that they were lessees entitled to the possession of it, but also in the sense that they were entitled to the user of it, subject to the easement granted to the trader.

Held, that the words "belonging to the company" in section 4 of the Railway and Canal Traffic Act, 1894, do not mean belonging, in a legal sense, as being owners of real property; and that it would be possible for a siding to be on the freehold of a railway company, and yet not to belong to the company within the meaning of the section. *Huntington and Others v. The Lancashire and Yorkshire Ry. Co.* 237

2. *Siding "not belonging to the Company."*—An ancient siding was situated on a railway company's land, and ran parallel to their main line, upon the same embankment, and had been constructed by the railway company. The railway company conveyed land for building maltings to the applicants upon the terms (*inter alia*) that they should have "full and free right and liberty at all reasonable times and in all reasonable ways to use without charge the railway siding for the purpose of conveniently forwarding and receiving and conveying all goods and commodities," and undertook to place in a convenient part of the said siding all trucks destined for the applicants, and also on request to remove and forward them with all reasonable expedition; the railway company further undertook to maintain the siding in good repair.

Held, that the siding was a siding "belonging to the railway company." *Girardot & Co. v. Great Eastern Ry. Co.* 244

3. *Station Accommodation and Terminal Services—Jurisdiction.*—The applicants were the owners of sidings which connected their works at Sheffield with the railway of the Midland Railway Company, and the applicants complained that in respect of traffic passing to or from such sidings they were charged rates of the same amount as were charged to traders whose similar traffic was dealt with at and made use of the Midland Railway Company's goods station at Sheffield, and they applied under section 4 of the Railway and Canal Traffic Act, 1894, for a rebate in respect that the railway company did not in the case of the siding traffic provide station accommodation or perform terminal services.

The railway company admitted the equality of the rates, but denied that the rates charged on siding traffic included any charge for a station or service terminals at Sheffield. They contended that the Commissioners had no jurisdiction to entertain the complaints, on the ground that the majority of the rates complained of were within the railway company's powers of charge for conveyance and terminals at one end only, and that the remainder of the rates complained of included charges for services at or in connection with sidings.

Held, that there was evidence that the rates in fact included terminal charges, and that the applicants were entitled to a rebate of the whole service and one-quarter of the station terminal.

REBATE ON SIDINGS RATE—*continued*.

Semble, that the Commissioners have jurisdiction under section 4 of the Railway and Canal Traffic Act, 1894, to allow a rebate without proof that any definite amount of terminal is included in the rate, and that *prima facie* it is enough to found jurisdiction under that section if it is shown that, in respect of similar traffic between substantially the same termini and passing over substantially similar routes, a sidings' trader, who does not require or use any terminal accommodation or services, is charged the same amount as a trader who uses the station.

Held, that under section 4 of the Railway and Canal Traffic Act, 1894, there is power to take every circumstance into consideration, and whether or not the railway company do anything for which they might claim an allowance outside the terminal of conveyance under their Rates and Charges Act (*per* WRIGHT, J.).

Held, that where a train by which sidings' traffic arrives conveys it as near to its destination as such a train on that particular portion of line can be reasonably expected to come, and deposits it for delivery at the point best fitted for that purpose, the transit from that point to the sidings is a service of delivery rather than conveyance, and where such delivery cannot be performed at the cost ordinarily incidental to it, it is among the services for which an addition to the tonnage rate may be allowed (*per* SIR FREDERICK PEEL).

Held, further, that the method of ascertaining the amount of the terminals by assuming them to be in the same proportion to the rates actually charged as the maximum terminals would be to the amount of the maximum sums chargeable for conveyance and terminals could not be adopted as a general rule; since it would necessarily be wrong whenever the cost and value of the terminal accommodation and services were very low or very high as compared with the cost of conveyance. A preferable method would sometimes be to refer to the stated terminal any excess over the maximum conveyance rate (*per* WRIGHT, J.).

Held (by the Court of Appeal) that the Railway Commissioners having agreed on the facts that a certain sum should be allowed as a rebate, there was no jurisdiction to raise the question of law as to whether it must first be shown that the charge in respect of which the rebate was claimed had in fact been made. *Vickers, Sons and Maxim, Limited, v. Midland Ry. Co. and others.* . . . 249

4. *Date from which Recoverable.*—Where an allowance is granted by the Court under section 4 of the Railway and Canal Traffic Act, 1894, the allowance *prima facie* should begin from the date of the "application," and not from the date of the judgment, nor from a time anterior to the application.

Where a siding owner does not require station accommodation, it does not necessarily follow that he ought to have an allowance in respect of not requiring it, since sidings may be a great burden to a railway company, and each case must stand on its merits.

Where a railway company has no power to charge a station terminal, and yet the rate is shown to include something for a station terminal, the Court is not necessarily bound to allow a rebate, since section 4 of the Railway and Canal Traffic Act, 1894, gives it a wide jurisdiction to do justice free from technicalities.

In ascertaining the component parts of a rate the system adopted in the case of *Pidcock v. Manchester, Sheffield and Lincolnshire Ry. Co.*, whereby the service charges were deemed to be in the same proportion to the rates actually charged as the

REBATE ON SIDINGS RATE—*continued*.

maxima service charges would be to the sum of the maxima rates chargeable, cannot be taken as an absolute measure; since, in a case like the present, where it is proved that no charge is made for loading or unloading, too little would be attributed to the cost of conveyance and to the station terminal. *Gilstrap, Earp & Co. v. Great Northern Ry. Co. and Midland Ry. Co.* 265

5. *Who may Apply—Comparable Rate—Station Accommodation—Special Services at Traders' Siding—Jurisdiction.*—A trader is not prevented from complaining under the Traffic Acts of a rate for carriage of coal from a colliery to his siding by the fact that the rate is paid by the colliery owners, the trader himself having no account with the railway company, since the rate is included in the price paid for the coal by the trader, and the colliery owners, for the purpose of paying the rate, are the agents of the trader.

In order to make a station coal rate comparable with a siding coal rate, the coal traffic at the station must bear some reasonable proportion to that at the siding, so that where 97 per cent. of the whole coal traffic went to the siding, and only 3 per cent. to the station, the explanation of the railway company that the station rate was merely a "paper" rate was accepted.

A trader who received coal at a private siding applied to the Commissioners for a rebate from a siding-to-siding rate, upon the ground that the siding-to-siding rate exceeded the maximum rate for conveyance, and was the same in amount as the siding-to-station rate charged to a neighbouring station. The railway company stated in their answer that the siding-to-siding rate, in so far as it was in excess of the conveyance maximum, was not charged for station terminal services, but was a reasonable charge made for services rendered at both ends of the journey.

Held, by the Court of Session (affirming the decision of the Railway Commissioners), (1) that it was not a condition precedent to the railway company lawfully making such a charge at a private siding that its reasonableness should have been determined by an arbitrator in an application under the Railway Rates and Charges Order Confirmation Act; (2) that the Commissioners had jurisdiction under the Traffic Act of 1894, for the purpose of determining whether the rebate claimed should be allowed, to determine whether the charge made by the railway company for services at the sidings was reasonable; and (3) that the determinations of the Commissioners upon the questions raised by the answer of the railway company were determinations upon questions of fact, and consequently not the subject of an appeal. *Cowan & Sons v. North British Ry. Co.* (No. 3). 271

6. *Sidings Agreement—Effect of Subsequent Legislation—Services at Trader's Siding.*—In 1891 a trading company entered into an agreement with a railway company for the construction of a siding. Clause 10 of the agreement was as follows: "The railway company will make to the limited company an allowance of not less than 3*d.* per ton for loading and unloading waggons and sheeting the same, in respect of cotton and yarns and other goods usually handled by the company, received at or forwarded from the proposed sidings. And the railway company will not charge any terminal in respect of coal traffic from the same."

Subsequently to the agreement the following Acts of Parliament were passed:—

1. The Railway Rates and Charges Order Confirmation Act, 1891 and 1892, by section 5 (subsection 1) of the schedule to

REBATE ON SIDINGS RATE—continued.

which railway companies are authorised to charge a reasonable sum, by way of addition to the tonnage rate, for services rendered to a trader at his request or for his convenience, at or in connection with sidings not belonging to the company.

2. The Railway and Canal Traffic Act, 1894, section 4 of which enacts: "Whenever merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute and to determine what, if any, is a reasonable and just allowance or rebate."

Upon an application by the trading company for a rebate under the Railway and Canal Traffic Act, 1894, and a cross application by the railway company for an allowance under the Railway Rates and Charges Order Confirmation Act, 1892:

Held, by the Court of Appeal (affirming the decision of the Railway Commissioners), that by the agreement the sidings in question were treated as a station, and the railway company were to charge as at a station less the special allowances.

Held, also, by the Court of Appeal (overruling the decision of the Railway Commissioners), that there was nothing in the subsequent legislation incompatible with the agreement, into which the parties had entered with the knowledge of impending legislation, and for perfectly good consideration, and by which they were bound. *Crompton & Co. v. Lancashire and Yorkshire Ry. Co.*

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THROUGH RATES.

1. *Apportionment of Through Rates—Bonus Mileage—Particulars of Rates Necessary.*—Upon an application under sections 25 and 26 of the Railway and Canal Traffic Act, 1888, to the Railway and Canal Commissioners to fix the apportionment of "all agreed-on rates chargeable on traffic passing, *via* the Forth Bridge, between stations on the Great North of Scotland railway and on the Caledonian railway between Aberdeen and Kinnaber Junction, on the one hand, and stations on the south of the Forth Bridge on the other, as between the respondents and the applicants, on the footing that the applicants shall receive in every case from the said rates as the share belonging to the Forth Bridge company, such sum as they would be entitled to receive if the distance traversed by such traffic over the Forth Bridge railway were 19 miles more than it actually is."

Held, that such a description of rates is too general and indefinite, and that full particulars are required of rates proposed for apportionment, which should include their amount, the termini for each rate, and the route between those termini, in order that no mistake may occur in the identification of the rates.

Held, further, that, although by sections 104 and 106 of the Caledonian and Scottish North Eastern Railways Amalgamation Act, 1866, the North British company were empowered to fix the rates and fares for Scottish east coast traffic over their own and the Caledonian company's lines, and it was further provided that, after the deduction of certain charges, including the proportion of any through rate payable to other companies, the residue of such rates and fares should be divided between the Caledonian company and the North British company according to the actual distance the traffic travelled over their respective railways, or in such proportions as might be agreed on between them, or in case of difference as should be settled by the arbitrator; yet the jurisdiction of the Court was not ousted by that of the arbitrator, because the application was not to apportion a through rate, or residue of a through rate, between the North British and Caledonian companies, but to apportion a through rate between all forwarding companies engaged in the east coast traffic.

Subsection 1 of section 25 of the Railway and Canal Traffic Act, 1888, which requires "written notice" of the proposed through rate to be given to each forwarding company, stating both the amount and the route proposed, and the proportion of the rate claimed by the company making the proposal, had been

THROUGH RATES—*continued.*

sufficiently complied with in this case, where each forwarding company, including the respondents, had after the opening of the Forth Bridge received the aforementioned particulars at meetings of the railway clearing-house, of which a written record was kept, although written notice had admittedly not been given to each forwarding company (*per* LORD TRAYNER).

Since the effect of the application would not be confined to the two respondent companies, but would leave a less sum to be divided among all the other companies interested, rates with which other companies were concerned could not be considered without such companies being joined as respondents (*per* SIR FREDERICK PEEL). *Forth Bridge and North British Ry. Companies v. Great North of Scotland and Caledonian Ry. Companies* . 1

2. *Notice—Jurisdiction—Railway.*—By section 25 of the Railway and Canal Traffic Act, 1888, written notice must be given of a proposed through rate to each forwarding company stating the amount, rate, and apportionment. If no objection be made by any forwarding company within ten days, the rate comes into operation. Where the objection is only to the apportionment of the rate, the rate comes into operation, and the decision of the Commissioners is to be retrospective.

On 14th January, 1890, a printed notice was addressed by the secretary of the clearing-house to the goods managers of the various companies requesting attendance at a meeting of the goods managers' Conference, and appending a list of subjects for discussion, among which was the following: "Mr. Macdougall will intimate the probable opening of the Forth Bridge railway in March next, and give notice that, in terms of the Forth Bridge Railway Acts, 1878 and 1882, the North British company (as the working company) will claim in division of receipts on traffic conveyed *via* the Forth Bridge an allowance as for 19 miles in addition to the actual mileage of the bridge railway." Certain of the companies interested assented to the claim so made, but others objected, and the sums in dispute were held in suspense in the clearing-house. On 19th October, 1898, the Forth Bridge company and the North British company served a notice upon all the companies interested in the Forth Bridge through route, which purported to be under section 25 of the Railway and Canal Traffic Act, 1888, setting forth that the applicants proposed and required that the through rates and fares then in operation *via* the Forth Bridge, and particularly those set forth in a schedule to each notice, should be continued in operation, and that the apportionment among the applicants and the other companies of the said rates and fares should be made on the footing that the Forth Bridge Railway was 19 miles longer than it actually is. In the schedule were set forth a selection of the through rates then in operation *via* the Forth Bridge between certain stations of the company receiving the notice and certain other stations south of the Forth Bridge. Objections having been lodged to the allowance and apportionment, the Forth Bridge company and the North British company applied to the Railway Commissioners to apportion the scheduled rates and fares, and also all other agreed-on rates and fares *via* the Forth Bridge on the footing that the applicants should be credited with the said 19-mile bonus.

Held, by the Court of Session (affirming the judgment of the Railway Commissioners):

- (1) That the notice of 19th October, 1898, was a valid notice

THROUGH RATES—*continued*.

within the meaning of section 25, subsection 1, of the Railway and Canal Traffic Act, 1888, and, therefore, that the Railway Commissioners had jurisdiction to entertain the application ;

(2) That the notice of 14th January, 1890, was not a valid notice within the meaning of the said subsection, and, therefore, the rates in operation were not agreed-on rates, but must be granted or disallowed in the application before the Commissioners ; and accordingly, as the objections before them were to the allowance as well as to the proposed apportionment, their order should not be retrospective.

The Railway and Canal Traffic Act, 1888, s. 25, subs. 9, enacts that "it shall not be lawful for the Commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route."

Held, by the Court of Session (affirming the judgment of the Railway Commissioners), that this provision applies only to companies which, besides having part of a through route, work another route between the termini of the through route, and are in a position to make a legal charge for which traffic may be carried from end to end of it. *Forth Bridge and North British Ry. Companies v. Great North of Scotland Ry. Co. and others* . 14

3. *Dock Company—Lines within area of the Dock Estate*—"Railway Company."—The Regulation of Railways Act, 1873, defines the term "railway company" as including "any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament," and the term "railway" as including "every station, siding, wharf or dock of or belonging to such railway and used for the purposes of public traffic."

Section 25 of the Railway and Canal Traffic Act, 1888, after making provisions for through traffic, enacts that "the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company at the request of any other such company of through traffic to or from the railway or canal of any other such company at through rates, tolls, or fares."

Upon an application under this section by a dock company for through rates it was proved that such company owned and worked with their own engines under parliamentary authority lines of railway on their dock property, and had (also under parliamentary authority) constructed and set aside for the use of a railway company large sidings situated at a distance of 29 chains within the dock boundary, to which sidings the railway company conveyed traffic to be exchanged with the dock company. A portion of a public railway had been transferred to the dock company, but this railway was not a part of the through route in respect of which the application was made. There was no statutory regulation of tolls or rates chargeable by the dock company, except for dock services, and the Railways Clauses Consolidation Act, 1845, was not incorporated in their special Acts.

Held, by WRIGHT, J., and LORD COBHAM (SIR FREDERICK PEEL dissenting), that the dock company owning and working under parliamentary authority railways which were part of one

THROUGH RATES—continued.

continuous route from another railway company's system to the exchange sidings, were a "railway company" who could propose through rates to that other company under section 25 of the Railway and Canal Traffic Act, 1888.

Held, by the Court of Appeal (reversing the decision of a majority of the Railway Commissioners), that the dock company were not a "railway company" competent to propose through rates within the meaning of the Railway and Canal Traffic Act, 1888, the railways (including the transferred line) being merely ancillary to their dock undertaking, and not part of a continuous line of railway communication from a place on one railway to a place on another railway. *London and India Docks Co. v. Great Eastern Ry. Co. and Midland Ry. Co.* 57

As to rescinding through rates 48

As to rebate out of through rates 48

See also *Facilities, Due and Reasonable, for Traffic, 1.*

THROUGH ROUTE. See *Through Rates, 3, Facilities, Due and Reasonable, for Traffic, 1.*

TIMBER, MEASUREMENT OF.

Charges for Conveyance of Timber—Measurement of Timber—Most Accurate Mode—By section 18 of the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, it is enacted that "the cubic contents of timber consigned by measurement weight shall be ascertained by the most accurate mode of measurement in use for the time being."

Held, that the most accurate mode of measurement in use, of the cubic contents of round timber consigned by measurement weight, is measurement by string under bark, with a divisor of 113, with reasonable allowances for any irregularity or defect in the shape of the timber measured.

The Court did not determine the question whether the railway company were entitled to make any charge in respect of the carriage of bark excluded from the measurement of timber as above provided. *Great Western Ry. Co. v. Lowe* 132

TRADERS' TICKETS. See *Undue Preference, 3.*

TRANSHIPMENT OF GOODS 49, 50, 52

UNDUE PREFERENCE.

1. *Canal Tolls—Rebate under Special Agreement—Considerations affecting the Case*.—Section 27, subsection 2, of the Railway and Canal Traffic Act, 1888, enacts: "In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, . . . the Commissioners . . . may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant . . ."

The applicants, corn millers and merchants at York, in the course of their business brought cargoes of wheat up the river Ouse to York. They complained that the respondents (as trustees for improving the navigation of the river Ouse) charged Messrs. L., flour millers and corn merchants at York (competitors in trade with the applicants), a sum by way of toll for the

UNDUE PREFERENCE—*continued.*

use of the river Ouse navigation, within the jurisdiction of the respondents, which worked out to a payment of about 1½*d.* per ton on wheat brought up the river Ouse to Messrs. L.'s works at York, and charged the applicants for similar traffic brought up the river Ouse to the applicants' works at York tolls for the use of such navigation amounting to 6*d.* per ton.

By an agreement dated 1st of October, 1888, and made between the respondents and Messrs. L., the respondents agreed to accept a maximum annual payment of 600*l.* from the said firm, in place of the tolls which would otherwise have been payable, for the whole of the wheat brought by them over that part of the river Ouse navigation which is within the respondents' jurisdiction, irrespective of the amount of the tonnage which might use the said navigation.

The respondents sought to justify the agreement on the ground that at the date it was entered into Messrs. L. contemplated transferring their business to Hull, which would have seriously diminished the tolls and would even have imperilled the maintenance of the navigation, and that such a removal would also have caused a serious loss to the ratepayers of the city, and, moreover, that Messrs. L.'s business had increased to a far greater extent than was contemplated when the agreements were entered into.

Held, that, after taking into consideration these and other matters, the difference in the amount charged to Messrs. L. and to the applicants for the use of the river Ouse navigation in connection with the conveyance of wheat was an undue preference given to Messrs. L. over the applicants. *Fairweather & Co. and others v. Corporation of York.* 201

2. *Benefit of Geographical Position—Group Rates—Cartage.*—Upon a complaint by corn millers at Goole that the railway companies did not, in respect of flour traffic in four-ton lots consigned by the applicants from Goole, give the applicants the benefit of the geographical position of Goole as compared with the port of Hull, with regard to various inland towns, there being a saving of about one-fifth of the total distance to them from Hull in respect of Goole, whereas the rates charged were the same :

Held, that the railway company had failed to prove that if the same mileage rate per ton were applied to Goole as was applied to Hull any injustice would follow, or that the maintenance of the existing Goole rate were necessary to the maintenance of the Hull traffic; and, therefore, that the railway companies had given an undue preference to the traders in flour at Hull over the applicants by charging rates of the same amount as the rates at which they carried similar traffic from Goole for the applicants.

Where no reason is shown to the contrary the Court will act on the principle that similar charges should be made for similar services.

Upon a further complaint by the applicants that the railway companies collected in Hull, free of charge, flour when consigned by their railways, or allowed rebates off the rates charged for conveyance when the cartage was performed by the consignors, but refused to collect the traffic of the applicants at Goole free of charge, or to allow the applicants when they did the collection a rebate as allowed to their competitors at Hull :

Held, that such distinctions, as regards collection or charges for the same between Hull and Goole were an undue prejudice

UNDUE PREFERENCE—*continued.*

and disadvantage to the applicants at Goole as compared with their competitors in trade at Hull. *Timm & Son v. North-Eastern Ry. Co., Lancashire and Yorkshire Ry. Co., and others* 214

3. *Traders' Tickets—Issue of, at Rates varying according to Amount of Traffic.*—A railway company issued season tickets to traders who sent or received traffic yielding annually 250l. or over at a cheaper rate than to ordinary passengers, the cost of such traders' season tickets being about one-third of the cost of an ordinary season ticket. To traders whose traffic yielded over 1,000l. the railway company gave a still greater reduction on the season ticket rate.

Upon a complaint that the railway company were unduly preferring traders who sent or received large quantities of traffic to those sending or receiving small amounts of traffic:

Held, that it was entirely a matter of fact whether the preference given was undue, and that where such a preference was given to all persons alike upon purely business considerations, there was a strong presumption that the preference was not undue; and that, on the facts proved, no undue preference existed. *Inverness Chamber of Commerce v. Highland Ry. Co.* 218

4. *Coal Traffic—Rebate under Special Agreement—Damages Recoverable for Six Years only.*—A railway company had, since the year 1889, under an agreement, allowed a rebate of from one to one-and-a-quarter per cent. upon the total annual carriage accounts paid by Messrs. Rickett, Smith in respect of the carriage of coal from collieries situated on the railway company's system of railways to all stations or places in the United Kingdom, other than stations on the Great Eastern Railway outside London.

The applicants, who were competitors in trade with Messrs. Rickett, Smith, complained that the railway company had not allowed such rebate in respect of similar traffic carried by the railway company for the applicants and delivered in like manner. The applicants first became aware of the existence of the rebate in October, 1900.

Held, that the terms and conditions contained in the agreement with Messrs. Rickett, Smith did not afford a justification for the railway company making a difference between Messrs. Rickett, Smith and the applicants as regards any rebate on their annual carriage accounts of more than a quarter per cent. in favour of Messrs. Rickett, Smith.

The Court, therefore, allowed to the applicants on their annual accounts with the railway company for the carriage of coal from collieries on the railway company's system of railways for six years before the termination of the agreement, damages equal to the allowance per cent. made by the railway company during that period to Messrs. Rickett, Smith on their annual carriage account with the railway company for carriage of similar traffic, less one-quarter per cent.; such damage to be in respect of the applicants' coal traffic to places (stations on the Great Eastern Railway outside London excepted) to which comparable and competitive coal contributing to their carriage account with the railway company had also been sent in substantial quantities within twelve months by Messrs. Rickett, Smith.

Held, further, that the words "Rebates are allowed to coal merchants off their coal traffic accounts in certain cases and upon certain conditions, where the annual tonnage carried exceeds 25,000 tons; particulars of the conditions qualifying

UNDUE PREFERENCE—*continued.*

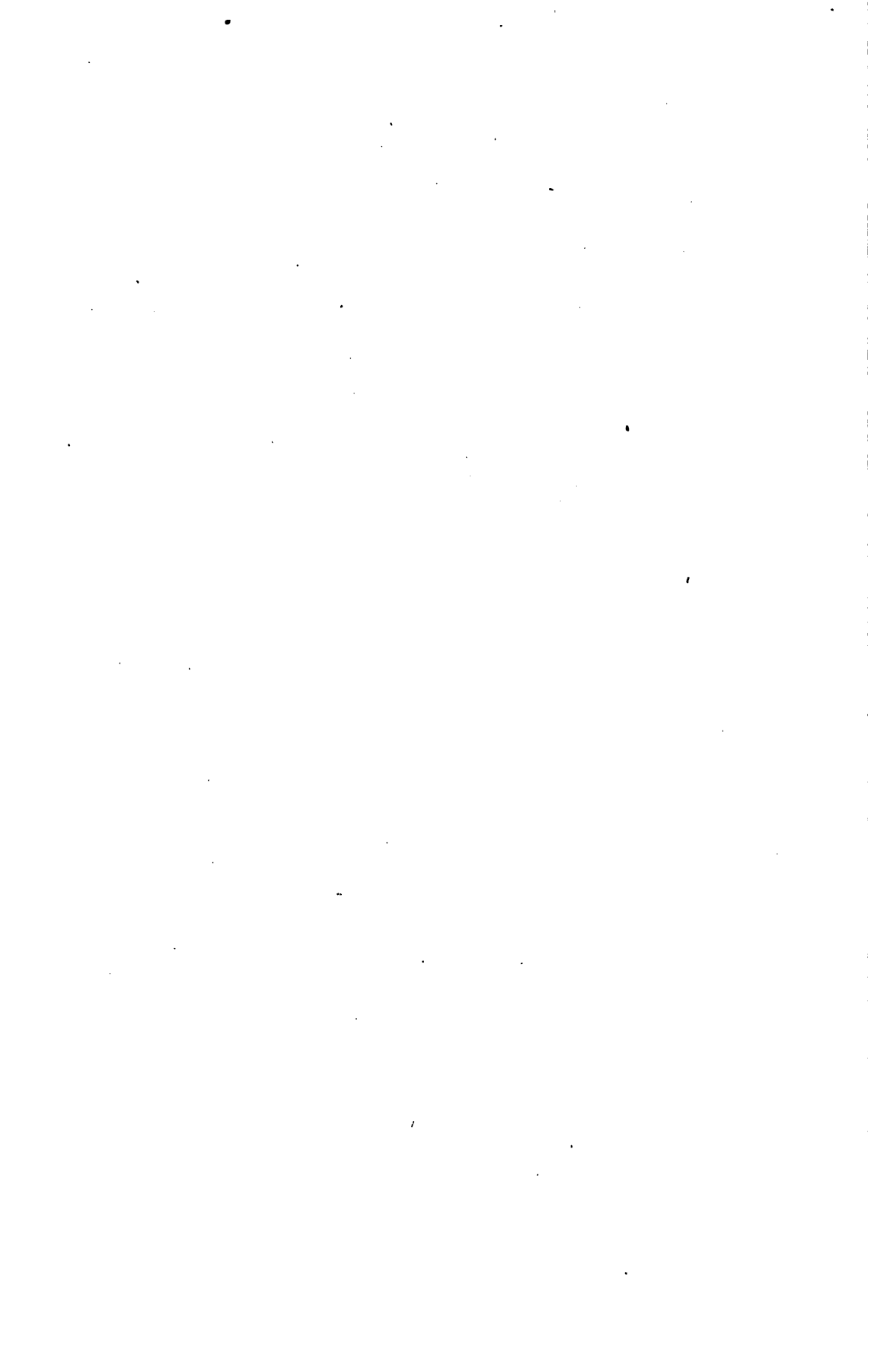
merchants to this allowance may be obtained on application to the general manager," inserted in the rate books, were not sufficient to disclose the existence of the rebate in accordance with the 14th section of the Regulation of Railways Act, 1873.
Charrington, Sells, Dale & Co. v. Midland Ry. Co. . . . 222

by refusal to deliver at private siding 96

See also *Proposed Rate, Whether Undue Preference.*

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